No. 510

IN THE

Supreme Court of the United States

October Term 1948

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); UNIT 1, LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); JOSEPH KAHOLOKULA, SEICHI DOI, HARRIS YOSHIO NAGATA, BENJAMIN AWANA, FRANK MATSUI, GEORGE FERNANDEZ, ERNEST FERNANDEZ, CHARLES REVERA, JOHN DOE, MARY DOE, RICHARD DOE, *et al.*,

Petitioners,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioners, the International Longshoremen's and Warehousemen's Union, an affiliated local and unit, trade unions in the Territory of Hawaii, and individual members and officers of these unions, pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered on September 27, 1948 (R. 113). A petition for rehearing, filed on November 15, 1948, within the time allowed therefore by the court, was denied on November 16, 1948 (R. 114).

The decree of the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the Supreme Court of the Territory of Hawaii entered on December 4, 1946, denying Petitioners' request for a perpetual writ of prohibition. (R. 71).[1]

This court's jurisdiction to grant this petition rests on the Act of June 25, 1948 (62 Stat. .....), U.S.C., Title 28, Section 1245, Subsection 1, which provides that cases in the courts of appeals may be reviewed by writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

OPINIONS BELOW

The opinion of the Supreme Court of the Territory of Hawaii (R. 58) dismissing the writ is reported at 37 Haw. 404, and its opinion denying rehearing (R. 77) is reported in 37 Haw. 445. The opinion of the Circuit Court of Appeals (R. 106) is reported at 170 F. (2d) 183.

STATUTES INVOLVED

The statutes involved are the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. 101-115), the Sherman Act, Section 3 (26 Stat. 209, 15 U.S.C. 3), and the Clayton Act, Section 20 (38 Stat. 730, 738, 29 U.S.C. 52, and 53). These statutes are set forth in the Appendix to this petition.

QUESTION PRESENTED

Are territorial courts "courts of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the procedural and substantive provisions of that Act applicable in the Territory of Hawaii?

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[1] Rehearing denied by Supreme Court of Hawaii, January 23, 1947 (R. 77).

STATEMENT OF MATTER INVOLVED

Proceedings

Petitioners sought from the Supreme Court of the Territory of Hawaii a perpetual writ of prohibition against the respondent judge and sugar company. Petitioners asked that court to prohibit respondents from taking further action in, except to dismiss, an equity action in which the respondent judge, without complying with the provisions of the Norris-LaGuardia Act, issued an ex parte temporary restraining order which, among other restraints, prohibited picketing in company camps or towns used for residence purposes, and prohibited mass picketing defined as groups larger than three.

Contempt proceedings for alleged violations of this ex parte order were, at the time of the filing of the petition for writ of prohibition, pending against certain of the individual members and officers of the union, and such contempt proceedings are still pending.

The petition alleged that the Norris-LaGuardia Act limits the jurisdiction of the federally-created circuit courts in the Territory, and that the respondent judge was without jurisdiction to issue restraining orders or injunctions without complying with the terms of that Act. The petition further alleged that the record of the equity action made a part of the complaint showed on its face the failure of the respondent judge and sugar company to comply with the Norris-LaGuardia Act.

Facts

The respondent sugar company petitioned the respondent judge of the Circuit Court of the Second Judicial Circuit for injunctive relief against the petitioning union and its officers and members, prohibiting what the respondent company in its petition alleged to be unlawful acts of intimidation and coercion (R. 23).

The employees of the sugar company, members of the petitioning local union, were, at the time the respondent

company sought injunctive relief, on strike against the respondent company.

On motion of the respondent company (R. 33) on October 17, 1946, the respondent judge issued an ex parte temporary restraining order (R. 36). This order prohibited:

(a) interference with ingress and egress to the company's property located in Maui County,

(b) acts of coercion and intimidation,

(c) picketing of homes,

(d) mass picketing.

The respondent judge further limited peaceful picketing as follows:

> And In Furtherance Hereof, You are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets stationed at points of ingress and egress to the Petitioner's property, exclusive of the homes occupied by Petitioner's employees, said pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and without interfering with the Petitioner, its employees, or any other persons seeking to enter or leave the Petitioner's premises; said pickets being also enjoined from otherwise committing any of the acts hereinabove specified. Any persons engaging in picketing to the extent authorized above shall wear arm bands reading "Authorized Picket." (R. 38)

An order to show cause why an injunction should not be granted was issued by the respondent judge against Petitioners, returnable October 28, 1946 (R. 92).

The respondent judge granted the ex parte order limiting peaceful picketing to three because of the Territorial law prohibiting unlawful assemblies and riots.[2] The respondent judge in his oral decision stated:

[2] Sections 11570-11584, Revised Laws of Hawaii, 1945. This law, which provides that an assembly of three or more, if there is tumult and violence, is an unlawful assembly, was declared unconstitutional by a specially constituted court, on December 27, 1948, in *ILWU v. Ackerman*, Civil Nos. 828 and 836, in the Federal District Court for the District of Hawaii, ... F. Supp. .....

> The petition asks the Court to fix the number of pickets to be allowed. The Court, being mindful of our statutes on unlawful assembly and riots, and this motion for a temporary restraining order being directed for the sole purpose to prevent rioting and violence, the Court will follow the pattern set forth in the statute and permit but three pickets. (R. 91)

Before the return day, on October 23, 1946, the respondent company filed a motion for an order directing the county attorney to investigate violations of this ex parte order, alleged to have occurred on October 18, 1946. Pursuant to this motion, on October 23, the respondent judge ordered the county attorney to investigate alleged violations (R. 97). The order was subsequently amended, on November 4, to "suggest" rather than "order" that the county attorney investigate such alleged violations (R. 98).

Thereafter, the county attorney filed an information charging certain individuals with contempt of the ex parte order (R. 53).

On the filing of the petition, the Supreme Court of the Territory issued a temporary writ of prohibition against the respondents and an order to show cause why a perpetual writ should not be issued (R. 42).

The answer and return of the respondent judge (R. 45) admitted the existence of a labor dispute and non-compliance with the Norris-LaGuardia Act, but denied that the Norris-LaGuardia Act had any application to a circuit court of the Territory or a circuit court judge sitting in equity, or that the terms and conditions of said Act had any bearing on the propriety or validity of the respondent judge's acts in connection with the issuance of the ex parte restraining order.

The return of the respondent company (R. 55) admitted the existence of a labor dispute and that its petition did not comply with the provisions of the Norris-LaGuardia Act, but denied that the Act limited or in any way affected the jurisdiction of circuit courts of the Territory.

OPINION OF SUPREME COURT OF THE TERRITORY OF HAWAII

The Supreme Court of the Territory of Hawaii entered judgment dissolving the temporary writ, denying a perpetual writ and dismissing the petition. The court denied rehearing and reargument.

Petitioners argued that territorial circuit courts which were created by Congress and are subject to its plenary control at all times are courts of the United States as defined by the Act and that a circuit court judge has no jurisdiction to issue a restraining order in a case growing out of a labor dispute without complying with the provisions of that Act. Petitioners argued that the Act creates substantive rights for working people in the Territory, and that a circuit court judge has no power to restrain acts specifically made lawful by act of Congress. Petitioner argued that this court in *United States v. Hutcheson*, 312 U.S. 219, 61 S. Ct. 463, 85 L. ed. 788, has held that the Norris-LaGuardia Act is one of three interrelated acts and is amendatory of the Sherman and Clayton Acts both of which represent exercises of Congress' plenary power to legislate for the Territory of Hawaii, and that the amending Norris-LaGuardia Act must be given the same scope.

The court in its opinion by LeBaron, J., who, as a circuit court judge had reached the opposite conclusion,[3] in 1938, based its judgment dismissing the petition on the ground that:

> The meaning, then, of a "court of the United States", drawn from every part of the Norris-LaGuardia Act as well as from its caption "An Act * * * to define and limit the jurisdiction of courts sitting in equity * * *," is interpreted to be any court of the United States

[3] *Neves v. Reber* (Unreported), Eq. 3948, in the Circuit Court of the First Judicial Circuit. From 1938 to 1946, as a result of the decision by Judge LeBaron in this case, the application of the Norris-LaGuardia Act to territorial circuit courts was not questioned.

whose jurisdiction has been or may be conferred or defined or limited by Act of Congress under Article III of the Constitution and which court is one of first instance, sitting in an equity case involving or growing out of a labor dispute, with authority therein to issue restraining orders and injunctions reviewable in either the Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia.

OPINION OF THE CIRCUIT COURT OF APPEALS

On appeal to the Circuit Court of Appeals, Petitioners assigned as error the making and entering of the judgment; the conclusion of the opinion that a circuit court of the Territory is not a court of the United States as defined by and within the meaning of the Norris-LaGuardia Act; the conclusion that the Act applies only to constitutional federal courts; the failure of the court to give the Norris-LaGuardia Act the same scope and coverage in the Territory as the Clayton and Sherman Acts which it amends; the narrow procedural construction given to the Act; and the court's failure to give effect to the public policy and to the substantive rights created by the Act.

The Circuit Court of Appeals based its decision on the same ground as the Supreme Court of the Territory—that the legislative definition contained in the Act includes only constitutional federal courts created under Article III of the Constitution. The court denied Petitioners' request for rehearing.

REASONS FOR GRANTING THE WRIT

I

The Circuit Court of Appeals, in affirming the judgment of the Supreme Court of the Territory of Hawaii holding the Norris-LaGuardia Act inapplicable to the federally created courts of the Territory of Hawaii, has decided a federal question of substance never determined by this

court. The effect of the decision is to deny to the three million residents of the territories and possessions of the United States the protection and benefits of a most important national labor law, and to becloud the rights of these persons under other interrelated federal laws. The method of statutory construction pursued and the narrow procedural approach adopted by the courts below in reaching this conclusion are not in accord with the manner in which this court has consistently held the Norris-LaGuardia Act must be interpreted in order to accomplish its purposes. The construction placed on this Act by the courts below permits courts created by Congress to flout the public policy of the United States declared in the Act, and results in giving to legislative courts created by Congress in the territories and possessions greater power in the issuance of injunctions in labor disputes than constitutional federal courts have.

II

The Circuit Court of Appeals has decided an important question of federal law which has not been but should be decided by this court, and has decided this question in a manner in conflict with the decisions of this court. The Norris-LaGuardia Act, this court has held, amends the Clayton and Sherman Acts, *United States v. Hutcheson*, supra. Both the Sherman and Clayton Acts represent an exercise by Congress of its plenary power to legislate for the territories and possessions. Both Acts apply to territories and possessions in a wholly different way than to states. In respect to states, Congress has exercised its power to regulate interstate commerce. In respect to territories and possessions, Congress has exercised its power to legislate in the field of local law and has controlled all aspects of intra-territorial commerce except those specifically exempted. The substantive rights of labor which Congress carved out of the Sherman Act must be given the same scope in the

territories and possessions as the prohibitions against monopolies and restraints of trade. Since, as this court has held, the Norris-LaGuardia Act redefines the substantive rights created by the Clayton Act, the Norris-LaGuardia Act must be given the same scope, else the absurd result follows that an unamended Sherman Act and an unamended Clayton Act are in force in the territories and possessions. Both courts below ignored the complex problem presented for the first time of harmonizing and giving effect to these three interrelated acts in territories and possessions.

III

The courts below rested their decisions wholly on a technical construction of the legislative definition of "courts of the United States" contained in the Act. By judicial construction, they reduced the legislative definition, obviously framed to give the Act the widest possible scope, that is, all courts "whose jurisdiction has been or may be conferred or defined or limited by act of Congress" to "courts of the United States" mean "courts of the United States." The conclusion of the courts below would have greater validity and a sounder logical basis if the sometimes technically employed words "court of the United States" stood alone and undefined in the Act. In adopting this narrow technical construction, the courts below ignored the mandate of this court in *United States v. Hutcheson* that courts should interpret the Act to give hospitable scope to the intent of Congress, to effect its declared public policy, even if meticulous words are lacking, or even if Congress failed to express its will in words. By judicial construction of only one portion of the Act, the legislative definition, the courts enabled the territories and possessions to defy at will the public policy of the United States. The courts below failed to consider the legislative history; the interrelation of the Norris-LaGuardia Act with other federal laws; and the fact that Congress had consistently up to the time of the adoption of the

Norris-LaGuardia Act—in the Clayton Act and in the Railway Labor Act—and thereafter in the National Industrial Recovery Act, the Fair Labor Standards Act and the National Labor Relations Act—made all pieces of national labor legislation effective to the full extent of its power in the Territory of Hawaii, that is, in the field of intra-territorial commerce as well as in inter-territorial commerce between the Territory and the several states.

IV

This court has consistently held that the acts enumerated in Section 4 of the Norris-LaGuardia Act are legalized under all laws of the United States. It has held that the provisions in other sections of the bill in respect to the responsibility of unions and their officers and agents for illegal acts, the right to a jury trial in contempt cases, and other rights spelled out in the Act are substantive rights. *United States v. Hutcheson*, supra, *New Negro Alliance v. Sanitary Grocery Company*, 303 U.S. 552, 304 U.S. 542, 58 S. Ct. 703, 82 L. ed. 1012, *United Brotherhood of Carpenters, et al, v. United States, 330* U.S. *395*, 67 S. Ct. *775*, 91 L. ed. 973. The courts below refused to recognize the substantive character of these rights or to give effect to them.

Regardless of the application of the procedural provisions of the Norris-LaGuardia Act to territorial circuit courts, a circuit court judge, or even the territorial legislature whose power is limited to laws consistent with laws of the United States, locally applicable, cannot make illegal conduct which Congress has specifically legalized any more than such judges or legislature can immunize or make legal conduct made illegal in the Territory by the locally applicable Sherman and Clayton Acts. No court has power to enjoin legal conduct. Hence, the respondent judge was without jurisdiction to issue an ex parte order prohibiting peaceful picketing in company camps and so drastically limiting as to make meaningless the right of peaceful picketing

at the scene of the labor dispute. The courts below, therefore, should have granted the writ of prohibition prayed for.

V

The decision of the court below is in apparent conflict with the unanimous decision of a specially constituted three-judge federal court[4] in *ILWU v. Ackerman*, decided December 27, 1948, Civil Nos. 828 and 836, in the Federal District Court for the Territory of Hawaii, which considered the ex parte order issued by the respondent judge and strongly inferred the illegality of his action:

> After this occurrence picketing continued at Paia until the issuance by the Circuit Court of the Second Circuit of an ex parte temporary injunction in *Maui Agricultural Company, Limited v. International Longshoremen's and Warehousemen's Union, et al.*, Equity No. 325, limiting even peaceful picketing to three persons, the court stating in its opinion that picketing should be so restricted because of the territorial statute relating to unlawful assembly. See pp. 91-2 of the transcript of record in the appeal in the case of *International Longshoremen's Union v. Wirtz*, ... F. 2d ....., in the United States Court of Appeals for the Ninth Circuit. Logically, under the provisions of the statute as they will appear hereinafter, Judge Wirtz should have restricted picketing to two persons, not three. An application was made to the Supreme Court of the Territory for a writ of prohibition to issue against Judge Wirtz of the Circuit Court of the Second Circuit of the Territory of Hawaii to compel him to vacate the injunction. In *I.L.W.U., et al. v. Wirtz, et al.*, 37 Haw. 404, rehearing denied, Id. at p. 445, 21 the Supreme Court of Hawaii, holding that the Norris-LaGuardia Act, 29 U.S.C.A. Sections 101-115, was not applicable to the territorial courts of Hawaii, refused to issue a writ of prohibition against Judge Wirtz to compel him

[4] Biggs, Circuit Judge, Metzger, Chief Judge, and Harris, District Judge; opinion by Biggs, J., not yet reported.

> to vacate the ex parte injunction restricting picketing previously referred to. The decision of the Supreme Court of Hawaii was affirmed, as we have said, by the Court of Appeals for the Ninth Circuit. It should be noted that Judge Wirtz' decision constitutes an important contemporaneous construction of the application of the unlawful assembly and riot act.

In holding the unlawful assembly statute unconstitutional, the three-judge court further commented on the ex parte order issued by the respondent judge:

> Any gathering of pickets, or any picketing, however peaceful, might well "excite terror" in the mind of an employer of labor. Indeed the statute received such an interpretation in effect from the Circuit Court of the Second Circuit by Judge Wirtz, when he issued the ex parte injunction referred to above.

Although the case before the special three-judge court does not involve the Norris-LaGuardia Act, insofar as the decision casts doubt on the validity of the respondent judge's order, the decisions of that court and the court below are in apparent conflict.

VI

An ex parte restraining order prohibiting peaceful picketing in company camps used for residence purposes and so narrowly circumscribing the right of peaceful picketing elsewhere on the property of a large industrial agricultural company is surely void on its face. Since peaceful picketing engaged in singly or in concert is immunized and made legal by the Clayton and Norris-LaGuardia Acts, indeed, the Constitution itself, the refusal of the Supreme Court of the Territory to grant a writ of prohibition against proceedings for contempt for alleged violation of the order will cause Petitioners serious hardship and long continued deprivation of rights guaranteed by federal law and the Constitu-

tion. This court should intervene to prevent such flagrant deprivation of federal rights as Petitioners will suffer if they are forced to defend themselves against contempt—without a jury trial as guaranteed by the Norris-LaGuardia Act—for alleged violations of an order void on its face.

Respectfully submitted,

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CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,
Respondents.

BRIEF IN SUPPORT OF PETITION

QUESTION PRESENTED

Are territorial courts "courts of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the procedural and substantive provisions of that Act applicable in the Territory of Hawaii?

ARGUMENT

I

CIRCUIT COURTS OF THE TERRITORY OF HAWAII ARE SUBJECT TO THE PROVISIONS OF THE NORRIS-LAGUARDIA ACT BECAUSE THEY ARE COURTS WHOSE JURISDICTION IS CONFERRED, DEFINED AND LIMITED BY ACT OF CONGRESS.

A. The Legislative Definition

Section 1 of the Norris-LaGuardia Act conditions on strict conformity with the provisions of the Act and the public policy declared therein the existence of jurisdiction

of courts sitting in equity to issue restraining orders and injunctions in cases involving or growing out of labor disputes. It provides:[1]

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Congress placed its own construction on the phrase "court of the United States." By Section 3 it provided, "When used in this Act, and for the purposes of this Act,"

> The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

The legislative definition of the term "court of the United States" in Section 13 of the Norris-LaGuardia Act, if given its natural meaning, embraces any court which exists by virtue of the authority of the United States and whose jurisdiction has been or may be conferred *or* defined *or* limited by Act of Congress.

Circuit courts of the Territory were created and their jurisdiction both has been, and may be, conferred, *and* defined *and* limited by Act of Congress.

B. Application of Definition to Circuit Courts of the Territory

A review of the manner in which Congress has, in respect to the Territory of Hawaii, exercised the power vested in it by Article IV of the Constitution shows that Congress has delegated to local authorities, including local courts, some of its power, but that it has at all times reserved the right

[1] 47 Stat. 70, 29 U.S.C. 101.

to, and has, exercised its power directly in local affairs.[2]

By its Joint Resolution of July 7, 1898,[3] annexing the Hawaiian Islands to the United States, Congress accepted the cession to the United States by the Government of the Republic of Hawaii of "all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies."

In the period between July 7, 1898, and the enactment by Congress of the Organic Act of April 30, 1900, Congress exercised the sovereignty ceded to it by delegating to the existing officers of the Republic of Hawaii—civil, judicial and military—the government of the Islands, subject to direction by the President of the United States.

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[2] The Supreme Court of the territory in *Makainai v. Goo Wan Hoy*, 14 Haw. 607, 609 (1903), expressed better insight into the true status of the Territory in contrasts with a state than it shows here. In that case, it said:

> • • • The state, being an independent sovereignty within its sphere, makes its own constitution and laws, creates its own courts and fixes their jurisdiction; while a territory, being a political dependency under absolute control and dominion of Congress, its organic law is made by Congress and *its courts and their jurisdiction and procedure is defined by the same power.* (Italics ours.)

It should be further noted at the outset that the principle that an intention by Congress to supersede local law will not be presumed, relied on by the Territorial court (R. 58, 68), has no application to the question before the court because there is no local law dealing with the subject of the issuance of injunctions in labor disputes. By Section 9647, Revised Laws of Hawaii 1947, circuit court judges at chambers have power "to hear and determine all matters in equity." By Section 12401, circuit judges are given "full equity jurisdiction, according to the usage and practice of courts of equity in all cases where there is not a plain, adequate and complete remedy at law."

"Usages and practices of equity courts" is certainly a changing concept. All the series of cases legislatively disapproved by Congress in adopting the Norris-LaGuardia Act constitute equity practice. The respondents, because they disapprove of the purpose of the Norris-LaGuardia Act are struggling to maintain a concept of equity power which Congress outlawed because it found intolerable. Surely the respondent judge who exercises power delegated by Congress should not have power to flout the policy of Congress.

[3] Resolution No. 55 of July 7, 1898, 30 Stat. 750.

In this period between the adoption of the Organic Act and the Resolution of Annexation the courts of the Territory were courts of the United States exercising power by virtue of delegation of authority of Congress.

With the adoption of the Organic Act,[4] Congress conferred jurisdiction to exercise the judicial power of the Territory on the Supreme Court, circuit courts and on such inferior courts as the legislature might establish. Section 81 of the Organic Act[5] provided:

> That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the civil courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided.

Section 83 of the Organic Act[6] continued the laws of Hawaii relative to the Judicial Department, including civil and criminal procedures, except as amended by the Organic Act itself, and *subject to modification by Congress* or the Legislature.

Under no construction of the language of Section 81-83 of the Organic Act can any conclusion be reached other than that the Congress of the United States conferred jurisdiction on the Supreme and circuit courts of the Territory of Hawaii.

Nor did Congress stop with the conferring of jurisdiction. It defined and limited the general grant of jurisdiction to the Supreme and circuit courts of the Territory in several respects.

By Section 5 of the Organic Act,[7] Congress limited the

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[4] 31 Stat. 141, 48 U.S.C. 491 et seq.
[5] 48 U.S.C. 631.
[6] 48 U.S.C.A. 635.
[7] 48 U.S.C.A. 495.

power of the Legislature, as well as of the courts, by providing that the Constitution of the United States and *all laws of the United States not locally inapplicable* should have the same force and effect within the Territory as elsewhere in the United States.

By Section 6 of the Organic Act,[8] Congress continued in force only those laws of the Republic of Hawaii not inconsistent with the Constitution or laws of the United States or the Organic Act, and made these laws which were continued subject to repeal or amendment by it or by the Legislature of Hawaii.

By Section 55 of the Organic Act,[9] Congress placed residence limitations on the jurisdiction of the courts of the Territory—as well as the power of the legislature—to grant divorces.

By Section 80 of the Organic Act,[10] Congress empowered the President of the United States to nominate, by and with the advice and consent of the Senate, the Chief Justice and Justices of the Supreme Court and the judges of circuit courts. Congress likewise provided for the term of office of circuit court judges and provided that their salary should not be diminished during their term of office.

By Section 83 of the Organic Act,[11] Congress empowered circuit court judges to determine the times at which grand juries shall sit and to subpoena witnesses to appear before the grand jury.

By Section 84 of the Organic Act,[12] Congress prohibited judges of the Territory from sitting in cases in which a judge or his relatives were pecuniarily or otherwise interested, and delegated to the Legislature the power to add other causes of disqualification.

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[8] 48 U.S.C.A. 496.
[9] 48 U.S.C.A. 519.
[10] 48 U.S.C.A. 546.
[11] 48 U.S.C.A. 635.
[12] 48 U.S.C.A. 636.

By Section 86 of the Organic Act,[13] Congress granted to the Federal District Court of Hawaii the jurisdiction of district courts of the United States. In effect this divested the circuit and Supreme Courts of the Territory of jurisdiction previously exercised by them after the Resolution of Annexation, as for example jurisdiction in admiralty.[14]

By Section 92 of the Organic Act,[15] Congress fixed the annual salary of circuit court judges of the Territory of Hawaii and provided that they should be paid by the United States.

It is clear from these provisions of the Organic Act that from the outset circuit courts of the Territory were created, their jurisdiction was conferred, and their powers were defined and limited by act of Congress.

Congress in the Organic Act provided a continuing, ever existent standard for the exercise of power delegated by it to the Territorial legislature and courts—that is, consistency with the Constitution and laws of the United States, locally applicable.

C. Erroneous Construction of Definition by Circuit Court of Appeals.

Since Congress could have made the Act applicable to territorial courts, and since the definition does not on its face exclude them, the courts below found it necessary to construe the definition. In the course of the construction, they found an intention to exclude lurking in the definition.

1. Technical Construction of the Words "Court of the United States" Nullifies Legislative Definition.

The Circuit Court of Appeals found the intention to exclude in the use of the words "court of the United States" in the definition. It pointed out that this court has said that the words "court of the United States" are technical words and mean constitutional federal courts created under

[13] 48 U.S.C.A. 641-645.
[14] *Carter v. Second Judge*, 16 Haw. 242, 255.
[15] 48 U.S.C.A. 536, 539, 634.

Article III of the Constitution. It buttressed its conclusion by citing references to constitutional federal courts in the Senate Judiciary Committee report on the Bill (R. 106-109).

Technical words standing alone, or words to which a technical meaning has been ascribed by courts in the past, are generally construed in their established technical sense, unless a contrary intent is manifested by legislative definition or in the act as a whole. Here, the words do not stand alone. Petitioners argued that words "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress" are "an addition expressing a wider connotation."[16] The rationale of the court below that Congress by these words merely wished to extend the scope of the Act to constitutional courts created in the future seems inadequate. The court has reduced the definition to "court of the United States" means "court of the United States."

2. Legislative History Does Not Support Technical Construction.

The references in the Senate Report and in the Congressional debates to constitutional federal courts occur in contexts which make it clear that Congress was gravely concerned—one might almost say obsessed—with the question of its power. The Clayton Act had fared badly in the courts. Congress wanted to cure the evils about which labor had been complaining ever since the passage of the Sherman Act and its application by the courts to trade unions. Congress examined every Supreme Court decision affecting labor and every decision dealing with its power to determine public policy and to determine jurisdiction of inferior federal courts. To the best of its ability Congress tried to preclude the possibility that its labors would be destroyed by the courts or its will frustrated, as it had been in the Clayton Act.

It was the constitutional issue that focused the Congres-

[16] *Mookini v. United States*, 303 U.S. 20, 82 L. ed. 748.

sional drafters' attention, and the attention of the exponents of the bill, on inferior federal courts created under Article III of the Constitution. It has never even been suggested that legislative courts of the United States, as distinguished from constitutional courts, are not subject to plenary control by Congress.

Mr. LaGuardia indicated that Congress was primarily concerned with its power: "This bill does not take one iota of jurisdiction—*because we have not the power*—from state courts, and does not change any state law."[17] (Italics supplied.)

While this statement was made as an assurance to the states-righters, the legislative debates leave no doubt that the prevailing sentiment of Congress was that labor injunctions were evil, and that a majority would have taken jurisdiction from state courts if it had had the power.

There is not one word in the whole legislative history of the Act that indicates an intention to exercise less than the full power of Congress. There is not one word indicating an intention to exclude the federally-created courts of territories from the operation of the Act, nor to withhold from the 3,000,000 residents of territories the benefit of the rights created by the Act.

The full and natural meaning of the legislative definition encompasses the courts of territories which Congress created and whose judges are appointed by the President with the advice and consent of the Senate, and whose salaries are paid by Congress. The whole history of the Act makes it seem unlikely that Congress, in its vehement determination to eradicate the hated labor injunction, intended to permit any exception within the limits of its power.

3. Intent of Congress is Controlling, even if Territory Is Not Specifically Mentioned.

[17] *Congressional Record*, Vol. 75, Part 5, page 5478.

Even if the reference to inferior federal courts created under Article III of the Constitution in the Senate Report indicates that Congress was not thinking of, or considering, federally-created courts in the territories, the canon of construction of this Act laid down by this court—even if Congress had no consciousness of intention relating to these courts and omitted meticulous words except as to those courts which came most readily to mind—should be invoked to put into effect in the Territory of Hawaii the public policy of the United States.

The Circuit Court of Appeals cites the curiously long-uncodified definition of "court of the United States" set forth in 50 Stat. 753,[18] to indicate the kind of statute Congress might have drawn if it intended to include territorial courts within the purview of the legislative definition (R. 106, 111). If this statute, adopted in 1937, throws any light upon the question here presented, it is that there is no insurmountable obstacle, constitutional or verbal, to describing a territorial court as a "court of the United States." All that is necessary is to ascribe to the word "of" its customary sense of belonging, rather than considering the four words "of the United States" in a hyphenated, adjectival sense to create technical meaning. Any layman would do so.

4. Congress Regarded Appellate Procedure of Little Consequence.

The courts below also relied upon the procedural provisions of Sections 10 and 11 relating to appeals to support their exclusion of territorial courts from the operation of the Act.

We have the word of Senator Walsh of the Senate Judiciary Committee that Congress regarded these procedural appeal sections as inconsequential and the substantive rights as all important:

[18] (R. 106, 111) The provision of this section has now been incorporated in the new federal judicial code, Title 28, Judiciary and Judicial Procedure, Section 1252.

> We have endeavored in the framing of the bill to take care of the matter of appeals as best we possibly can; but no matter what we do about it, the appeal is no relief whatever, as the thing is all ended long before the appeal can be heard either one way or the other. Either the strike prevails or it does not prevail, *so the matter of appeal is of no particular consequence.*[19]

A failure or defect of a procedural character in respect to appeals cannot properly be used to diminish the scope of the Act and destroy substantive rights created by it. This court has always been alert to provide a forum to protect substantive rights. If these appellate provisions are inappropriate to territorial courts, the difficulty can be obviated by holding this section inapplicable to this situation[20] or this court can direct that the procedure in ordinary cases, i.e., an appeal from circuit courts to the territorial supreme court should govern, with the expedition features being given effect.

The "state and district" in Section 11 represent merely the procedural aspects of the substantive right to a jury trial in contempt cases. In the recent decision in the *Andres* case[21] the Supreme Court found no difficulty in carrying out a uniform policy in respect to death penalties in the Territorial District Court as elsewhere in federal district

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[19] *Congressional Record,* Vol. 75, Part 5, p. 4930.

[20] See Section 14, which provides: If any provision of this Act (Chapter) or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act (Chapter) and the application of such provisions to the other persons or circumstances shall not be affected thereby.

That these procedural sections offer no serious obstacle is illustrated by Section 1252 of the new federal code, which provides for direct appeal to this court from interlocutory or final judgments holding an act of Congress unconstitutional from "any court of record of . . . Hawaii." Courts of record include the Supreme Court and circuit courts, and probably, under this section as drawn, the Federal District Court for Hawaii.

[21] *Andres v. Territory of Hawaii,* 92 L. Ed. 790.

courts, even though the "meticulous" word "Territory" was omitted.

5. Fallacy of Logic of Circuit Court of Appeals.

The tortuous complexity of the rationale necessary to explain away the legislative definition impugns the validity of the conclusion. If Congress had been aware of, or intended, to adopt the technical, "well-defined" meaning of the words "court of the United States," which the court below relies on, obviously no definition was necessary. The definition is a declaration and a warning that what Congress gives it can take away.

Petitioners believe that primarily the erroneous conclusion of the courts below results from ripping the legislative definition from the context of the Act and considering it apart from the public policy and the other provisions of the Act.

II

THE HISTORY OF THE NORRIS-LA GUARDIA ACT AND ITS SPECIFIC PROVISIONS INDICATE THAT CONGRESS INTENDED THAT IT SHOULD BE GIVEN FULL FORCE WHEREVER CONGRESS HAD THE POWER TO MAKE IT EFFECTIVE.

A. Public Policy

The Circuit Court of Appeals, as well as the Supreme Court of Hawaii, relied almost wholly on the legislative definition contained in Section 13 (d) of the Act in arriving at the conclusion that circuit courts of Hawaii are not "courts of the United States," within the meaning of the Act and are not affected by either the procedural or substantive provisions of the Act. This narrow, procedural approach contravenes the public policy declared in the Act, and is not in accord with the way in which this Court has said the Act should be interpreted.[22]

[22] *United States v. Hutcheson,* 312 U.S. 219, 61 S. Ct. 463, 85 L. ed. 788. *New Negro Alliance v. Sanitary Grocery Company,* 303 U.S. 552, 304 U.S. 542, 58 S. Ct. 703, 82 L. Ed. 1012.

1. The Declaration of Policy.

Section 1 of the Act directs that no injunctive relief shall be granted "contrary to the public policy declared." Section 2 of the Act declares "the public policy of the United States" and contains the mandate that the Act shall be interpreted in the light of that policy.

In substance, the declaration recognizes the helplessness of the individual unorganized worker against the owners of property and the consequent necessity that he "have full freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization, or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In presenting the bill to the Senate, Senator Norris read each section and explained its purpose. He characterized Section 1 which says "no court of the United States shall have jurisdiction . . ." *as a preamble to the public policy.* After reading the declaration of policy he said:[23]

> If the act or any part of it should be involved in any litigation where an injunction was issued or asked for, the judge before whom such action was pending would be required to give full force and effect to the public policy thus declared by the act; and, *having in mind the public policy thus declared, he would be able to so construe the various provisions of the Act as to give full effect and validity to the public policy thus declared.* (Italics supplied.)

Here is the mandate: The public policy is the law. The other provisions of the Act are to be construed to give it full effect. Yet the courts below considered the public policy not at all.

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[23] *Congressional Record,* Vol. 75, Part 4, p. 4503.

Congress made the public policy positive substantive law. Senator Blaine, a drafter and supporter of the bill, and a member of a special sub-committee of the Senate Judiciary committee which considered the legislation and held hearings on it during the 70th, the 71st and the 72nd Congress, stated in the debates in the Senate:[24]

> When a declaration of public policy goes to the extent of declaring substantive law, then it ceases to be a mere declaration of public policy, but is the enactment of positive substantive law.

Both the Senate and House Reports on the Bill state that the declaration of public policy was drawn in the language of the Railway Labor Act which the Supreme Court had upheld and enforced in equity in *Texas and New Orleans Railroad Co. vs. Brotherhood of Railroad and Steamship Clerks,* 281 U.S. 548, 74 L. ed. 1034. The Senate report states specifically that the Norris-LaGuardia Act creates the same rights for all employees as was given to railroad employees.

The Railway Labor Act applies to intra-territorial commerce in the Territory. Under the *Texas and New Orleans* case all employees of railroad carriers in the Territory could enforce their substantive rights. It is Petitioners' contention that Congress intended by the Norris-LaGuardia Act to give the same substantive rights to other employees in the Territory.

This court, in the *Hutcheson* case, supra, indicated at Page 235 that the public policy should be made fully effective:

> To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex Printing Press Co. Case* still governs for purposes of a criminal prosecution is to say that that which on the equity side of

[24] *Congressional Record,* Vol. 75, Part 5, page 4681.

> the court is allowable conduct may in a criminal proceeding become the road to prison . . . That is not the way to read the will of Congress, particularly when expressed in a statute which, as we have already indicated is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking.

When Congress passes legislation to remedy evils "which have become intolerable" and are "violations of sacred rights of human liberty and freedom," and remind of involuntary servitude, can it be presumed that Congress intended to permit continued oppression by courts and employers in the territories over which it has plenary power?[25] It did not omit the Territory of Hawaii from the scope of any other national labor law passed prior to the Act, or subsequently.

2. Congress and Labor in the Territory of Hawaii.

Congress has perhaps most frequently exercised its power to legislate in the field of local law in respect to Hawaiian labor, and has shown a consistent awareness of the necessity for protective labor legislation in the Territory.

On annexation of the Territory, Congress immediately took cognizance of the conditions of labor, and in the Organic Act[26] relieved workers from the serfdom of indentured labor contracts.[27]

Before the passage of the Norris-LaGuardia Act, labor in the Territory organized or attempted to organize, and to strike. There were Territory-wide organizations and

[25] See *Page v. Burnstine,* 102 U.S. 664 where the court said: "The same considerations of public policy which would require the enforcement of such a statute . . . in the Circuit and District Courts of the United States . . . would suggest its application in the administration of justice in the courts of the district."

Territory-wide strikes even on plantations, but these organizations could not withstand the combined power of the employer and the Government.[28] This combined power was perhaps most frequently exercised in labor disputes on the criminal side of the court, with the employer-paid lawyers designated by the Attorney General serving as special prosecutors,[29] but the newspaper and court records indicate a considerable use of the labor injunction prior to the passage of the Act.[30]

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[26] Section 10, which provides in part: "That no suit or proceeding shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or services, nor shall any remedy exist or be enforced for breach of any such contract except in a civil suit or proceeding instituted solely to recover damages for such breach," and further declaring contracts for personal services for a definite term made after August 12, 1898, null and void.

[27] The Report of the Attorney General of the Territory in 1890 shows that 5,387 persons were convicted for violation of these contracts for the biennial period ending March 31, 1890.

[28] See *ILWU v. Ackerman,* ..... F. Supp. ....., decided December 27, 1948. The court in its opinion by Biggs, J., takes notice of and discusses much of this history, in holding criminal prosecutions against strikers were brought in bad faith during the 1946 sugar strike and the 1947 pineapple strike.

[29] *Ibid,* p. 17, court print.

[30] For example, during the 1909 Japanese strike, referred to in newspapers as "the higher wage conspiracy" the Pacific Commercial Advertiser for July 9, 1909 reports that Circuit Court Judge Robinson issued an injunction against the Nippu Jiji (a Japanese newspaper supporting the strikers) ordering it to put an end to articles that included threats of boycott or ostracism, and enjoining thirty-three strike leaders from committing any acts of violence and from picketing places where employees of the Oahu Sugar Company and other Japanese laborers frequented for the purpose of intimidating them. See also *Territory of Hawaii v. Soga,* 20 Haw. 71, sustaining a conviction for conspiracy against the leaders of the Higher Wage Consummation Association. The charge was concerting together "to do what plainly and directly tends to incite and occasion offense and to do what was obviously and directly injurious to another" by conspiring to prevent certain corporations owning sugar plantations in the County of Honolulu from carrying on their business and operating their plantations, and thereby impoverishing them. (The territorial conspiracy statute under which these strikers were convicted was declared unconstitutional on December 27, 1948, by the three-judge federal court in *ILWU v. Ackerman, supra.*)

Nor can it be urged, as the Circuit Court of Appeals does, that Congress was unaware of the conditions of labor in the Territory. At the time of the adoption of the Organic Act, it required the United States Commissioner of Labor Statistics to present to the Congress every five years reports on the commercial, industrial, social, educational, and sanitary conditions of the laboring classes.[31]

[31] 31 Stat. 155; 33 Stat. 164; 37 Stat. 737; 29 U.S.C. 7. The Third Report of the Commissioner of Labor on Hawaii, 1905, Page 141 described the violations of the rights of labor and the disregard of their civil rights:

> The old customs and the habit of regarding Japanese and other Orientals as people of inferior civil status as compared with whites still prevail in Hawaii and manifest themselves in a hundred unconscious acts on the part of the managers and overseers, who have never considered that in the strict letter of the law residents of a foreign country domiciled within our territories have the same rights to protection of person and property and to privacy and respect as ourselves. At the time of the Lahaina strike (late in May, 1905), militiamen and police went in squads to the rented quarters of the strikers in the town of Lahaina—not upon the plantation itself—entered without ceremony or shadow of legal right and roused the inmates, using persuasion that came but little short of force to get them out to a conference which the management desired to hold with the men and which they, in the exercise of their rights, declined to attend. One of the most liberal and progressive managers in the Islands spoke with lively resentment of the criticism made by a judge of an act of one of his overseers, who had without legal authority or warrant forced open the door of a house occupied by Puerto Rican laborers suspected of theft, dragged the occupants from their bed, and discovered stolen property in their possession.

Congress showed an awareness of the depressed conditions of labor in the Territory by extending to the Territory every act of national labor legislation, such as the Clayton Act (1912), the Railway Labor Act (1926), adopted from 1900 to 1932. The same Congress that adopted the Norris-LaGuardia Act extended Section 7 of the National Industrial Recovery Act (1933) to the Territory, and succeeding Congresses legislated for the Territory in the National Labor Relations Act (1935), the Fair Labor Standards Act

(1938), and the Labor Management Act (1947). These acts apply to the Territory in the broadest possible scope, and in a broader scope than they apply to the states. In the states, these acts affect only employers and employees engaged in interstate commerce; in the Territory, they affect employers and employees engaged in intra-territorial commerce as well, and thus cover every phase of employer-employee relationship in the Territory, except industries specifically and uniformly exempted from the coverage of the acts.

If the Norris-LaGuardia Act, which is an integral part of national labor policy, is held inapplicable in the Territory, the comprehensive scheme which Congress devised is destroyed.[32]

The *ex parte* order issued by the respondent judge, prohibiting picketing in company camps and towns used as residences and limiting picketing at points of ingress and egress to three (R. 38), reminds of the very worst features of the worst injunctions that gave rise to the demand for reform and that motivated Congress to adopt the Norris-LaGuardia Act.[33]

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[32] With the decision of the Territorial Supreme Court, that destruction began: In defiance of the public policy of the United States, territorial circuit court judges, in four strikes involving from two hundred workers to twenty thousand workers, and thousands of acres of plantation property and company towns, have issued sweeping ex parte injunctions restraining the approximately one hundred thousand members of an international union and all persons acting in concert with them, from mass picketing or congregating in crowds (usually specified as two or three) have been issued.

[33] Frankfurter and Greene, *The Labor Injunction*, passim. At pages 264-269, the injunction issued by Judge Benson Hough against the United Mine Workers in the 1927 strike is set forth in full as being typical of one of the worst restraining orders issued by federal courts. Judge Hough limited picket posts on or adjacent to the public highways leading to the mines to three persons at a post. Judge Hough expresses in words the psychology apparent in Judge Wirtz's order: "Persuasion in the presence of three or more persons congregated with the persuader is not peaceful persuasion, and is hereby prohibited."

The will of Congress and its public policy, are frustrated by the decisions of the courts below.

B. The Interrelation between the Norris-LaGuardia Act, and the Sherman and Clayton Acts, and the Creation of Substantive Rights.

The Circuit Court of Appeals misconstrued petitioners' contentions, in respect to the effect in the Territory of the interrelation between the Norris-LaGuardia Act and the Sherman and Clayton Acts, both of which apply to the Territory; and in respect to the effect in the Territory of the substantive rights created by the Clayton and Norris-LaGuardia Acts. Indeed, the court below seems to construe Section 20 of the Clayton acts as authorizing injunctive relief in federal district courts rather than as limiting such power (R. 106, 112). This was the judicial construction of the Clayton Act which the Norris-LaGuardia Act was designed to change.[34]

[34] This portion of the opinion discussing the Clayton Act is susceptible to the interpretation that the court is holding, the words, "courts of the United States" in Section 20 inapplicable to the Federal District Court for Hawaii. While petitioners agree that this would be the only construction that would support the theory that the Act applies only to constitutional federal courts, it is untenable because of the definition of commerce and of persons contained in Section One of the Act. The Clayton Act must confer jurisdiction on the Federal District Court for Hawaii to enforce the anti-trust provisions of the Clayton Act in the Territory. Two decisions of the Territorial Federal District Court, *Alesna v. Rice*, 69 F. Supp. 897, 74 F. Supp. 865, and *Hall v. Moore*, 72 F. Supp. 533, hold that the Norris-LaGuardia Act applies to the Federal District Court for Hawaii, but not to territorial courts. This holding creates a paradox which the Circuit Court of Appeals was possibly trying to avoid by excluding the Territory from the provisions of Section 20. For if the Norris-LaGuardia Act applies to the Federal District Court of the Territory—which is a legislative court of the United States created under Article IV of the Constitution—the territorial district court has upheld the conclusion of the Supreme Court of Hawaii and of the Circuit Court of Appeals, but has invalidated the basis of the decisions.

Petitioners argued before the courts below that the Sherham, Clayton and Norris-LaGuardia Acts must be read together, and since the two former acts are effective in the Territory, the Norris-LaGuardia Act must likewise be held to apply to and affect the Territory. When these laws are so read, petitioners contend that a conclusion that the procedural and substantive provisions of the Act apply to territorial courts, including the circuit courts, is inescapable. In the alternative, petitioners contended that even if the procedural provisions of the Act do not apply to territorial courts, the provisions creating substantive rights inure to persons in the Territory,[35] and consequently, no territorial court has jurisdiction to enjoin the exercise of these federal substantive rights. Both contentions go to the question of the jurisdiction of the respondent judge, for no judge has jurisdiction to enjoin lawful conduct.

The Sherman Act of July 2, 1890, was in force at the time of the annexation of the Republic of Hawaii to the United States. It specifically applied to Territories. When Congress provided in the Organic Act that all laws of the United States, not locally inapplicable, should be given effect in the Territory, and limited the legislative power to laws not inconsistent with laws of the U.S. locally applicable, the Sherman Act automatically became law in the Territory. The Sherman Act applied to commerce in and within Territories, and thus represented an exercise by Congress of its plenary power to legislate for territories.

When the Clayton Act was adopted on October 15, 1914, its provisions relating both to monopolies and conspiracies in restraint of trade and to labor's rights were respectively applicable to commerce in and within the Territory, and to all persons, associations and corporations in the Territory. Congress by section 20 of the Clayton Act sought to legalize, under all laws of the United States, acts which

[35] 29 U.S.C.52, 53.

courts had previously held to be illegal. Its failure is written in the pages of judicial history; its tragedy, in the lives of workers. Congress tried again.

Senator Wagner, on the Senate floor during debate, invoked this history to make clear the magnitude of what Congress was trying to do:[36]

> We thought we had made a real advance when we passed the Clayton Act, but the hopes which the enactment of that law engendered have been blasted. The adjustment we sought to make thereby has not been made. The friction has continued and intensified. Injunctions are still issued containing restraints which, in the opinion of one Justice of the Supreme Court, remind of involuntary servitude.
>
> Under the blighting effect of the law as it has developed, we have seen the entire coal industry suffer disorder, violence, disintegration. We have seen the federal courts converted into strike-breaking agencies. We have seen freedom of speech, freedom of association, even the freedom to cooperate in refraining from work smothered under the blanket of injunctions which now covers the Nation.
>
> What is our problem?
>
> It is far bigger than the mere setting down of rules of practice in certain cases that come before the federal courts.
>
> Our problem is no less than that of marking out the boundaries of governmental action in the contest and contact between labor and industry.

The primary objective of the Norris-LaGuardia Act, as stated by the Senate Committee, and as stated many times during the debates, was "to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second the right to advance the lawful objectives of the association."[37]

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[36] *Congressional Record*, Vol. 75, Part 5, p. 4915.

[37] *Senate Reports*, 72nd Congress, First Session, Vol. 1, Report No. 163, p. 10.

The Act accomplishes these purposes in two ways:

1. By the creation of substantive rights to engage in these activities free from fear of subsequent criminal prosecution under any law of the United States.
2. By the absolute prohibition against their restraint by courts of the United States.

What are the "immunized trade union activities"—the substantive rights guaranteed by Section 20 of the Clayton Act as amended by the Norris-LaGuardia Act—which shall not be considered or held to be violations of any law of the United States:

1. The right to be free from yellow-dog contracts which are made unenforceable and void as against public policy.
2. In any labor dispute, as broadly defined in the Act, to do singly and in concert all the acts specifically enumerated in Section 4, and the protection against responsibility for the illegal acts of others without proof of participation, the right to a jury trial in contempt cases, etc.

The intent of Congress to legalize the rights in Section 4 is beyond question. Senator Norris, in presenting the bill to the Senate, stated:

> Section 5 says that the doing of these acts shall not be held by a court to be a conspiracy. *In Section 4 we already say they are legal* and no injunction shall be issued against anyone, even though there are several of them who have agreed to unite in any one of them.

And after quoting with explanatory comments each of the "legal" provisions of Section 4:

> Is there anybody who objects to any one of those recitals? Is there any one of them that is unfair? This amendment simply provides that *two or more* laboring men who agree to do any one of the acts I have enumerated shall not be held to be guilty of a con-

> spiracy. What is wrong about that? I ask any fair-minded man on earth? In any other case except a case involving a labor dispute one would be laughed out of court if he tried to charge a conspiracy on evidence as to any of the acts enumerated in the provisions I have read. Such a charge would apply nowhere and never has been made, so far as I know, except against men who toil, and as a rule, against men who toil down in the bowels of the earth in the mines.

Senator Bratton asserted:

> The difference is that *the acts enumerated in section four* are perfectly legal.

Senator Norris replied:

> We have declared them to be so, although it ought not to be necessary to do so.[38]

To give effect to these substantive rights in the Territory of Hawaii, the immunized trade union activity must be given as broad a scope as the Sherman and Clayton Act out of which, as judicially construed, Congress carved them. It would not seriously be contended that the Legislature of the Territory of Hawaii can legalize the acts made criminal in the Sherman and Clayton Acts. Yet the result of the decision of the Circuit Court of Appeals and the Supreme Court of the Territory is to permit territorial circuit court judges by fiat to declare illegal and restrainable conduct that Congress has specifically declared legal.[39]

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[38] *Congressional Record*, Volume 75, Part 5, p. 4931. This reference includes statements of Senator Norris also.

[39] This situation is reminiscent of Governor Altgeld's classical description of labor injunctions contained in his biennial message to the Illinois Legislature in January, 1895:

> The judge issues an ukase which he calls an injunction, forbidding whatever he pleases and what the law does not forbid, and thus legislates for himself without limitation and makes things penal which the law does not make penal, makes other things punishable by imprisonment which at law are only punishable

If these substantive rights, as Petitioners contend, inure to trade unions and their members in the Territory of Hawaii, then an *ex parte* order prohibiting an International Union, a local, and a local unit, and all persons acting in concert with them from all picketing whatsoever in company towns and camps used for residence purposes, and prohibiting engaging in peaceful picketing in numbers larger than three, in an agricultural strike involving hundreds of employees, is clearly beyond the jurisdiction of the respondent judge.

In the years since the adoption of the Norris-LaGuardia Act this court has identified peaceful picketing with the right of free speech guaranteed by the First Amendment. To a considerable extent, the legalized conduct under the Clayton and Norris-LaGuardia Act and constitutional rights overlap and are co-extensive, but with this difference: Congress declared the hated labor injunction an inappropriate weapon in labor disputes and withdrew it entirely except in cases involving fraud or violence, and even in those instances, carefully controlled the methods of its use.

If the respondent judge has jurisdiction in an ex parte hearing to enter the order here attacked, a circuit court judge of the Territory can do without hearing, what neither the Congress of the United States nor any state legislature can do by law.

CONCLUSION

The Circuit Court of Appeals erred in affirming the judgment of the Supreme Court of the Territory of Hawaii, denying Petitioners a perpetual writ of prohibition, because

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by fine, and he deprives men of the right of trial by jury when the law guarantees this right, and he then enforces this ukase in a summary and arbitrary manner by imprisonment, throwing men into prison, not for violating a law, but for being guilty of contempt of court in disregarding one of those injunctions. . . . These injunctions are a very great convenience to corporations when they can be had for the asking by a corporation lawyer.

the respondent judge was without jurisdiction to punish for contempt of the ex parte restraining order issued without complying with the Norris-LaGuardia Act, or in the alternative, was without jurisdiction to restrain the Petitioners from exercising rights guaranteed by federal law.

Respectfully submitted,

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APPENDIX

THE NORRIS-LA GUARDIA ACT

Act of March 23, 1932, c. 90, 47 Stat. 70
29 U.S.C.A. § 101 et seq.

Sec. 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Sec. 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon,

the jurisdiction and authority of the courts of the United States are hereby enacted.

Sec. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of

any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act.

Sec. 6. No officer or members of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon

clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complain-

ant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or

with the aid of any available governmental machinery of mediation or voluntary arbitration.

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Sec. 10. Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the Circuit Court of Appeals for its review. Upon the filing of such record in the Circuit Court of Appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Sec. 11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or

disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Sec. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

Sec. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such

dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Sec. 14. If any provision of this Act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby.

Sec. 15. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

THE SHERMAN ANTI-TRUST ACT

Act of July 2, 1890, c. 647, 26 Stat. 209.
15 U.S.C. 3

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such

combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE CLAYTON ACT

Act of Oct. 15, 1914, c. 323, 38 Stat. 730.
15 U.S.C. 12-27; 18 U.S.C. 412; 28 U.S.C. 381-383, 386-390a; 29 U.S.C. 52, 53.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor

shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

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TABLE OF CITATIONS

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STATUTES

OTHER REFERENCES

In the
Supreme Court of the United States
October Term, 1948
No. 510

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); UNIT 1, LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO); JOSEPH KAHOLOKULA, SEICHI DOI, HARRIS YOSHIO NAGATA, BENJAMIN AWANA, FRANK MATSUI, GEORGE FERNANDEZ, ERNEST FERNANDEZ, CHARLES REVERA, JOHN DOE, MARY DOE, RICHARD DOE, et al.,

Petitioners,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,

Respondents.

BRIEF OF RESPONDENT CABLE A. WIRTZ, JUDGE OF THE CIRCUIT COURT OF THE SECOND CIRCUIT, TERRITORY OF HAWAII, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decree of the United States Court of Appeals for the Ninth Circuit was entered September 27, 1948. (R. 113-114) Petition for rehearing, which was filed within the time allowed therefor by rule of court and an extension thereof, was denied November 16, 1948. (R. 114) The petition for writ of certiorari and brief in support thereof (hereinafter referred to as the petition) were filed January 13, 1949.

STATEMENT OF THE CASE

The statement of the case given in the petition, as qualified and corrected by the brief of respondent Maui Agricultural Company, Limited (hereinafter referred to as respondent company), is adopted for the purposes of this brief. However, it is deemed necessary to add that the contempt proceedings referred to in the petition (pp. 3, 5) are summary criminal contempt proceedings. Because the nature of the contempt proceedings is important in this case, as will be shown in the following argument, the information by which the proceedings were instituted is included in the appendix of this brief.

SUMMARY OF ARGUMENT

We are opposed to the granting of the petition. We believe the reasons stated in the petition for granting the writ are insufficient and that they are shown to be insubstantial by the brief of respondent company.

Concurring therein, we wish to adopt the argument in the brief of respondent company and to supplement it with a discussion of the contempt proceedings referred to in the preceding paragraph.

The following argument is directed to the ground stated in paragraph VI[1] of the petition (pp. 12-13) for granting the writ, which we construe as contending that the fact that petitioners stand charged for contempt for violating an allegedly void order issued by respondent circuit judge warrants review of the case by this Court. We propose to show (1) that the contempt proceedings in question are for criminal contempt as distinguished from civil contempt, (2) that the pending contempt proceedings are not within the scope of the petition for writ of prohibition which petitioners sought in the Supreme Court of Hawaii, and (3) that regardless of the outcome of this suit for prohibition, petitioners are liable and subject to be punished for criminal contempt. We conclude therefrom that the liability of petitioners for criminal contempt in the pending contempt proceedings does not justify the grant of certiorari.

ARGUMENT

1. *The contempt proceedings pending before respondent circuit judge are proceedings for criminal contempt as distinguished from civil contempt.*

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[1]The reference in said paragraph to ". . . . the refusal of the Supreme Court of the Territory to grant a writ of prohibition against proceedings for contempt . . . ." is deemed erroneous and misleading for the reason that the contempt proceedings complained of by petitioners were not within the scope of the petition for writ of prohibition.

a. Distinction Between Criminal and Civil Contempt

It is generally recognized that there is a substantial distinction between criminal contempt and civil contempt, the fundamental difference being that in the latter the purpose of the proceedings is remedial and for the benefit of the complainant while in the former the purpose is punitive and to vindicate the authority of the court and the public interest. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441; *Michaelson* v. *United States*, 266 U. S. 42, 64; *Lamb* v. *Cramer*, 285 U. S. 217, 220; *McCrone* v. *United States*, 307 U. S. 61, 64; *Nye* v. *United States*, 313 U. S. 33, 42; *United States* v. *United Mine Workers*, 330 U. S. 258, 302; *Penfield Co.* v. *Securities & Exchange Commission*, 330 U. S. 585, 590; *Fenton* v. *Walling*, 139 F. (2d) 608, 609 (*cert. den.* 321 U. S. 798); *Ando* v. *Ando*, 30 Haw. 80, 87.

This basic difference in purpose is reflected in a difference in the form of the proceedings. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause, while those for criminal contempt are between the public and the defendant and are not a part of the original suit but are separate and independent proceedings. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, at 445; *Penfield Co.* v. *Securities & Exchange Commission*, *supra*, at 590; *Parker* v. *United States*, 153 F. (2d) 66, 70; *United States ex rel. West Virginia-Pittsburg Coal Co.* v. *Bittner*, 11 F. (2d) 93, 95; S. *Anargyros* v. *Anargyros & Co.*, 191 Fed. 208, 210. There are, however, variances from the rule, as in *United States* v. *United Mine Workers*, *supra*,

where it was held that both civil and criminal contempt could be tried in a single proceeding in the main cause. 330 U. S. at 299. Nevertheless, such matters as the identity of the person by whom the contempt proceedings are brought and the title of the contempt proceedings are generally significant. Proceedings brought by the government through its prosecuting officer are almost invariably held to be criminal contempt proceedings. *McCann* v. *New York Stock Exchange*, 80 F. (2d) 211, 214 (*cert. den.* 299 U. S. 603); *Dunham* v. *United States ex rel. Kansas City Southern Ry. Co.*, 289 Fed. 376, 379; *Forrest* v. *United States*, 277 Fed. 873, 876 (*cert. den.* 258 U. S. 629); *Stewart* v. *United States*, 236 Fed. 838, 842.

Since the classification of contempt proceedings as civil or criminal depends upon the purpose of the proceedings, the prayer for relief is regarded as particularly significant and has been held to be determinative. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, at 448; *Lamb* v. *Cramer*, *supra*, at 220; *Penfield Co.* v. *Securities & Exchange Commission*, *supra*, at 590. In other cases the prayer has been treated as only one factor in classification. *Forrest* v. *United States*, *supra*, at 876.

Various other factors have been relied on in determining the nature of particular contempt proceedings. For example, in *United States* v. *United Mine Workers*, *supra*, the willfulness of the defendants' conduct and their policy of defiance were considered as supporting the conviction for criminal contempt. 330 U. S. at 303. An extensive discussion of this problem of classification with an analysis of the factors relied on by the courts is contained in an article on the subject *Con-*

tempt of Injunctions, Civil and Criminal, by Joseph Moskovitch, in 43 Colum. L. Rev. 780, cited in *United States* v. *United Mine Workers*, *supra*, 330 U. S. at 297. For the purposes of this brief, the foregoing discussion is deemed adequate to determine the proper classification of the contempt proceedings in question.

b. Classification of Contempt Proceedings in Question.

Proceeding, then, to a consideration of said contempt proceedings with a view to determining the classification, we have in the record a showing that they are summary contempt proceedings charging violations of the temporary restraining order issued in the equity suit which the petitioners sought to stay by the petition for writ of prohibition, that the alleged violations on which the proceedings are based were brought to the attention of the respondent circuit judge by affidavits and motion filed in the original equity suit, that thereupon the matter was referred to the county attorney and that subsequently summary contempt proceedings were instituted by the county attorney for such alleged violations. (R. 52-53; 93-99)

The record does not contain the information by which the contempt proceedings were instituted. Whatever may have been the actual reason for the exclusion, it was properly excluded for the reason that the proceedings in question are for criminal contempt and accordingly a separate and independent action. The information is printed as an appendix to this brief.

Said information was filed in equity as was the original suit, but given a new number, No. 327 (Appendix 13), the number of the original equity suit being No. 325 (R. 47; Appendix 15). The information further shows that the proceedings were entitled *In the Matter of the Contempt of Court of Benjamin Awana, et al.*,

and was brought in the name of the "TERRITORY OF HAWAII, by Wendell F. Crockett, Deputy County Attorney of the County of Maui" (Appendix 14), as distinguished from the main equity case, which was entitled *Maui Agricultural Company, Limited* v. *International Longshoremen's & Warehousemen's Union (CIO), et al* (R. 23). It further shows that the alleged violations were charged to be "in open and willful violation of said Restraining Order and in open and willful defiance and contempt of said Order and of [the] Court". (Appendix 16) Lastly, the information shows that the prayer was for a rule upon the defendants to show cause "why they should not be adjudged guilty of and punished for contempt of * * * Court". (Appendix 17)

It thus appears that a separate proceeding was brought in the name of the Territory by a duly authorized prosecuting officer charging a willful violation of the order of the court and praying for punishment for such contempt. On the basis of the authorities hereinabove cited, such facts clearly show, it is respectfully submitted, that the proceedings in question are criminal contempt proceedings.

2. *Criminal contempt proceedings are separate and independent proceedings and hence the pending contempt proceedings are not within the scope of the petition for writ of prohibition.*

On the basis of the rule cited on page 4 of this brief that criminal contempt proceedings are separate and independent proceedings as distinguished from civil contempt proceedings, which are part of the main cause, and the pleadings in the suit for writ of prohibition, it is submitted that the pending contempt proceedings are not in issue in this case.

The petition for writ of prohibition shows that the petitioners sought to stay further proceedings in a certain cause (R. 20), which, as the exhibits referred to in and attached to and made a part thereof show, is *Maui Agricultural Company, Limited* v. *International Longshoremen's & Warehousemen's Union (CIO), et al.* (R. 17, 23, 36, 39)[1] The petition for writ of prohibition does not in any way refer to the contempt proceedings, nor is the Territory of Hawaii, the plaintiff in the contempt proceedings, made a party thereto. It is therefore clear that the contempt proceedings are not within the scope of the petition for writ of prohibition.

3. *The determination of the issues in this case in favor of the petitioners would not preclude prosecution of the pending criminal contempt proceedings.*

A consequence of the rule that criminal contempt proceedings are separate and independent proceedings as distinguished from civil contempt proceedings, which are part of the main cause, is that criminal contempt proceedings may be prosecuted regardless of the outcome of the main cause while civil contempt proceedings stand or fall with the main cause. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, at 451; *United States* v. *United Mine Workers*, *supra*, at 294, 295; *Carter* v. *United States*, 135 F. (2d) 858, 860. Violations of an order are punishable as criminal contempt even though the order has been set aside on appeal

[1]On pages 36 and 39 and elsewhere in the record, the bracketed references to the court and cause are in error, the proper reference being the Circuit Court of the Second Circuit, Territory of Hawaii, and not the Court of Appeals.

(*Worden* v. *Searls*, 121 U. S. 14, 27; *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, 86 F. (2d) 727), or though the main cause has been mooted by a settlement between the parties (*Gompers* v. *Bucks Stove & Range Co.*, *supra*, at 451). On the other hand, a settlement of the main cause or the reversal of the order in the main cause bars relief for civil contempt. *Gompers* v. *Bucks Stove & Range Co.*, *supra*, at 451; *Worden* v. *Searls*, *supra*, at 26; *Bessette* v. *W. B. Conkey & Co.*, 194 U.S. 324, 329; *Salvage Process Corp.* v. *Acme Tank Cleaning Process Corp.*, *supra*; *S. Anargyros* v. *Anargyros & Co.*, *supra*, at 209.

It is therefore a well-established rule that an order issued by a court within its jurisdiction, even though the order be erroneous, must be obeyed, on pain of criminal contempt, until it is reversed by orderly and proper proceedings. *Worden* v. *Searls*, *supra*, at 27; *Howat* v. *Kansas*, 258 U.S. 181, 189; *United States* v. *United Mine Workers*, *supra*, at 293. Once the order has become final, even in a civil contempt proceeding the legality of the order cannot be relitigated, nor can disobedience thereof be justified on the ground that the order should not have issued in the first place. *Maggio* v. *Zeitz*, 333 U. S. 56, 69. In the *United Mine Workers* case it was further established that even an order issued in excess of jurisdiction must be obeyed pending the determination of the question of the court's jurisdiction, at least where the jurisdictional question is a substantial and not merely a frivolous question, and consequently that persons violating such an order pending such determination are guilty of and subject to be punished for criminal contempt.

United States v. *United Mine Workers, supra,* at 294; *Carter* v. *United States, supra,* at 862.

The rule of the *United Mine Workers* case, which was adopted by a majority of this Court as an alternative ground of decision in that case, removes any possible justification for interference with the pending contempt proceedings. Its significance for the purposes of this case is that regardless of the status of the original suit in equity the criminal contempt proceeding may be prosecuted. Even if the relief prayed for by the petitioners in their suit for writ of prohibition, that is, dismissal of the original equity suit, should be granted by the courts or accomplished by the action of the petitioner in said suit, nevertheless petitioners would be liable and subject to be punished for criminal contempt. The application of the rule to the instant matter is quite apparent. Petitioners are charged with violating an outstanding order pending determination of a substantial question of the court's jurisdiction to issue such order.

The rule of the *United Mine Workers* case will be followed by the courts of the Territory, it is submitted. While the Supreme Court of Hawaii has held, as well as stated in its opinions, that an order issued in excess of jurisdiction is unenforceable in civil contempt proceedings (*Ex parte Pahia*, 13 Haw. 575; *Dole* v. *Gear*, 14 Haw. 554; *Andrews* v. *Whitney*, 21 Haw. 264; *Sakan* v. *Ashford*, 23 Haw. 267, 271), there is no decision contrary to the *United Mine Workers* rule. In the one case involving criminal contempt, *Rose* v. *Ashford*, 22 Haw. 469, a writ of prohibition staying the contempt proceedings was issued. The case involved a question of the validity of an order issued by the trial court which charged the respondent sheriff

for failing to execute promptly a warrant of arrest, making a false return of the warrant and failing to comply with a request of the court that he appear before the court to explain the delay in service and ordered him to appear on a day certain to show cause why he should not be adjudged in contempt. Citing the rule that in cases of constructive contempt, such as that alleged in the order, it is necessary, in order to give the court jurisdiction to proceed for contempt, that a formal statement of some sort, such as an affidavit, complaint or information, stating the facts be filed as the basis upon which attachment may issue (22 Haw. at 472), the Court held that the order was void and that the lower court was without jurisdiction to proceed in contempt for the reason that no such statement was filed. The case is clearly distinguishable from the *United Mine Workers* case and likewise the contempt proceedings now pending before respondent circuit judge, which were instituted by a formal information. It is, therefore, submitted that the decisions of the Supreme Court of Hawaii are not in conflict with the *United Mine Workers* decision, and that the rule of that case is applicable to the pending contempt proceedings.

CONCLUSION

We believe we have shown that the fact that petitioners stand charged in pending criminal contempt proceedings does not justify the granting of the petition. We further believe that the brief of respondent company, which we adopt, demonstrates the lack of merit in the other grounds alleged in the petition for the grant of certiorari. We, therefore, respectfully submit that the petition should be denied.

Dated: Honolulu, Territory of Hawaii, this 2d day of February, 1949.

Respectfully submitted,

THOMAS W. FLYNN, Attorney for Respondent Cable A. Wirtz, Judge of the Circuit Court of the Second Circuit, Territory of Hawaii

WALTER D. ACKERMAN, JR.
Attorney General of Hawaii

MICHIRO WATANABE
Deputy Attorney General

of Counsel

APPENDIX

IN THE

Circuit Court of the Second Circuit

TERRITORY OF HAWAII

AT CHAMBERS

IN EQUITY
327

In the Matter of the Contempt of Court of: BENJAMIN AWANA, SEICHI DOI, ERNEST FERNANDEZ, GEORGE FERNANDEZ, FRANK FRANCO, LIONEL HANAKAHI, KOICHI ITO, BEN KAHAAWINUI, JOSEPH KAHOLOKULA, LIWAI KEALOHA, HARRIS YOSHIO NAGATA, RAFAEL PERRY, CHARLES REBERA, HITOSHI SERA, AND TAKESHI SHIMANO.

SUMMARY CONTEMPT PROCEEDINGS

INFORMATION

IN THE

Circuit Court of the Second Circuit

TERRITORY OF HAWAII

AT CHAMBERS — IN EQUITY # 327

In the Matter of the Contempt of Court of: BENJAMIN AWANA, SEICHI DOI, ERNEST FERNANDEZ, GEORGE FERNANDEZ, FRANK FRANCO, LIONEL HANAKAHI, KOICHI ITO, BEN KAHAAWINUI, JOSEPH KAHOLOKULA, LIWAI KEALOHA, HARRIS YOSHIO NAGATA, RAFAEL PERRY, CHARLES REBERA, HITOSHI SERA, AND TAKESHI SHIMANO.

SUMMARY CONTEMPT PROCEEDINGS

INFORMATION

And now comes the TERRITORY OF HAWAII, by Wendell F. Crockett, Deputy County Attorney of the County of Maui, and, complaining of the respondents mentioned by name in paragraph 4 of this Information, represents to the Court:

1. That at all times mentioned herein there was and still is pending in this Court a certain equity proceeding for injunction entitled "MAUI AGRICULTURAL COMPANY, LIMITED, PETITIONER, vs. INTERNATIONAL

LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), et al.", being Equity No. 325, wherein a Temporary Restraining Order was made and issued on October 17, 1946, which Restraining Order at all times mentioned herein was and is still in effect, a true copy of which said Order is attached hereto, marked Exhibit "A" and incorporated herein by reference.

2. That on the 17th day of October, 1946, said Temporary Restraining Order was duly served upon respondents Benjamin Awana, Seichi Doi, Ernest Fernandez, George Fernandez, Frank Franco, Lionel Hanakahi, Koichi Ito, Ben Kahaawinui, Joseph Kaholokula, Liwai Kealoha, Harris Yoshio Nagata, Rafael Perry, Charles Rebera, Hitoshi Sera and Takeshi Shimano, all being respondents mentioned in or covered by said Order.

3. That notice of said Temporary Restraining Order was further given generally to the entire Community in Paia, County of Maui, Territory of Hawaii, and elsewhere upon said Island of Maui, by publication of the fact of the issuance of said Order and of the substance of said Order in the late or afternoon editions on October 17, 1946, and in the October 18, 1946 editions of the Honolulu Advertiser and the Honolulu Star-Bulletin, both being newspapers printed and published in Honolulu, City and County of Honolulu, Territory of Hawaii, having a general circulation throughout said Territory, including said Island of Maui, all of which said newspaper editions are usually and were actually delivered and distributed on said Island of Maui on the date of issue thereof, and also by radio announcements on the afternoon and evening

of October 17 and the morning of October 18, 1946, over radio stations serving and customarily heard by the inhabitants of said Island.

4. That, notwithstanding that the persons hereinafter named as alleged violators of said Order had due notice of said Order and the contents thereof, as hereinabove set forth, a large number of persons, being members of International Longshoremen's and Warehousemen's Union (CIO), and some of them being members of Local 144 of the International Longshoremen's and Warehousemen's Union (CIO), and some of them being members of Unit 1, Local 144, International Longshoremen's and Warehousemen's Union, and of other persons acting in concert with them, in excess of one hundred ninety-four persons, and including, the following named persons:

Benjamin Awana	Joseph Kaholokula
Seichi Doi	Liwai Kealoha
Ernest Fernandez	Harris Yoshio Nagata
George Fernandez	Rafael Perry
Frank Franco	Charles Rebera
Lionel Hanakahi	Hitoshi Sera
Koichi Ito	Takeshi Shimano
Ben Kahaawinui	

and many others whose names are at present unknown to said Deputy County Attorney, on the morning of October 18, 1946, under the fraudulent pretense and guise of holding an alleged parade, in open and willful violation of said Restraining Order and in open and willful defiance and contempt of said Order and of this Court, did engage in mass picketing in numbers

in excess of one hundred ninety-four persons, and did congregate in crowds, on and near the premises of said Maui Agricultural Company, Limited, petitioner in said injunction proceeding (Equity No. 325 aforesaid), at said Paia, with intent to, and did then and there, interfere with the ingress to and egress from said Petitioner's mill, and other plantation buildings located at said Paia by said Petitioner, its employees and others who might desire entrance to said premises for the purpose of performing work and for other occasion, and did then and there threaten violence and use coercion and intimidation by force of numbers and otherwise by unlawful means upon said Petitioner's employees and others lawfully attempting to enter upon and proceed to and from said Petitioner's said premises.

WHEREOF, the said Deputy County Attorney, for and on behalf of the said Territory, moves this Court for a rule upon the defendents

Benjamin Awana
Seichi Doi
Ernest Fernandez
George Fernandez
Frank Franco
Lionel Hanakahi
Koichi Ito
Ben Kahaawinui
Joseph Kaholokula
Liwai Kealoha
Harris Yoshio Nagata
Rafael Perry
Charles Rebera
Hitoshi Sera
Takeshi Shimano

to be and appear before this court, on a day to be named, and show cause, if any they or any of them have, why they should not be adjudged guilty of and punished for contempt of this Court in respect of each

and all of the aforesaid contemptuous acts.

DATED: Wailuku, Maui, T. H., this 7th day of November, 1946.

(Sgd.) WENDELL F. CROCKETT
Deputy County Attorney of the
County of Maui

[*Note*: The exhibit referred to in paragraph 1 of the foregoing Information has been omitted. It is included in the Record at pages 36-39 and 39-42.]

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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO) et al.,

Petitioners,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,

Respondents.

ANSWERING BRIEF OF RESPONDENT MAUI AGRICULTURAL COMPANY, LIMITED IN OPPOSITION TO PETITION FOR CERTIORARI

TERMS USED IN THIS BRIEF

In this brief, for convenience, the Petitioners for the Writ of Certiorari are referred to as the "Petitioners," the combined Petition for Writ of Certiorari and Brief in Support Thereof are referred to as the "Petition," and the Respondent Maui Agricultural Company, Limited, is sometimes referred to as the "Respondent Company."

STATUTES INVOLVED

The statute primarily involved is the Norris-LaGuardia Act (Act of Mar. 23, 1932, 47 Stat. 70, 29 U.S.C. 101-115)

as stated on p. 2 in the Petition. If the Sherman Act, Sec. 3 (Act of July 2, 1890, 26 Stat. 209, 15 U.S.C. 3) and the Clayton Act, Sec. 20 (Act of Oct. 15, 1914, 38 Stat. 730, 738, 29 U.S.C. 52) are involved, as contended by Petitioners, which this Respondent denies, then the Hawaiian Organic Act (Act of Apr. 30, 1900, 31 Stat. 141) is also involved, especially Sections 1 (31 Stat. 141, 48 U.S.C. 493), 5 (31 Stat. 141, as am. May 27, 1910, 36 Stat. 443, 48 U.S.C. 495), 6 (31 Stat. 142, 48 U.S.C. 496), 10 (31 Stat. 143, 48 U.S.C. 501), 11 (31 Stat. 144, 48 U.S.C. 505), 55 (31 Stat. 150, 48 U.S.C. 562), 81 (31 Stat. 157, 48 U.S.C. 631), 82 (31 Stat. 157, 48 U.S.C. 632), 83 (31 Stat. 157, 48 U.S.C. 635), 84 (31 Stat. 157, 48 U.S.C. 636) and 86 (31 Stat. 158, 48 U.S.C. 641-5) thereof. The Norris-LaGuardia Act, Sec. 3 of the Sherman Law, portions of Sec. 1 and Secs. 6 and 20 of the Clayton Act, supra, are printed in the Appendix to the Petition. The above cited sections of the Hawaiian Organic Act are quoted in Appendix A to this brief.

QUESTION PRESENTED

The question presented is not as broad as stated in the Petition, p. 2. Actually, the only question presented is:

Is a circuit court of the Territory of Hawaii a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the provisions of that Act applicable to such a circuit court?

STATEMENT OF THE MATTER INVOLVED

Exception is taken to the statement in the first paragraph on p. 3 of the Petition characterizing the ex parte temporary restraining order issued by Territorial circuit judge Wirtz as one which "prohibited picketing in company camps or towns used for residence purposes, and prohibited mass picketing defined as groups larger than three." First, there is nothing in the Petition for the Writ of Prohibition or in

the record to show that the picketing prohibited was in "company camps or towns used for residence purposes" and the statement as to "company camps or towns" is now made for the first time in this court apparently as an afterthought. Furthermore, while the court prohibited mass picketing in crowds on or near the premises of the Respondent Maui Agricultural Company, Limited, because of evidence of violence over a period of a month immediately preceding the order, *which violence has never been denied* by the Petitioners in the Petition for Writ of Prohibition or otherwise at any stage of this case, it did not define mass picketing as picketing by groups of more than three, but simply limited picketing to a maximum of three pickets at points of ingress to and egress from the Petitioner's property. The statement is also immaterial, because the terms and form of the injunction are not involved in this case, and no question was raised below by Petitioners as to the form of the injunction, Petitioners having admitted in open court before the Territorial Supreme Court that the restraining order was in conformity with the laws of the Territory (R. 58, 77), nor could this point have been raised in proceedings for a writ of prohibition if the Norris-LaGuardia Act does not apply.

The statement in the last paragraph on p. 4 of the Petition to the effect that

> The respondent judge granted the ex parte order limiting peaceful picketing to three *because of the Territorial law prohibiting unlawful assemblies and riots,* (italics added)

is both immaterial and inaccurate, for reasons hereinafter shown. (Post; pp. 26-27.)

All of these allusions to the form of the restraining order, the "company camps or towns" and the restriction of mass picketing appear to be injected for the purpose of raising a constitutional issue which was neither mentioned nor

raised at any stage of these proceedings, whether in the Petition for Writ of Prohibition (R. 15-21), the Petition for Rehearing in the Territorial Supreme Court (R. 73-76) the Assignments of Error (R. 5-7) or otherwise. On the other hand, in their own Petition for Rehearing before the Territorial supreme court (R. 73), the Petitioners stated: "The lawfulness of the Temporary Restraining Order under the laws of the Territory, and the Constitution and laws of the United States — other than the Norris-LaGuardia Act — is not in issue and was not argued before this court in this cause."

The statement of facts also fails to show that, after granting the Motion for a Temporary Restraining Order and fixing the return day for Monday, October 28, 1946 (Exhibit 12 to Answer and Return of Cable A. Wirtz, R. 92-93), the Respondents had ample opportunity to move to quash or set aside the Temporary Restraining Order or to ask for the correction of any alleged deficiencies in the form or terms of the Temporary Restraining Order, and themselves twice requested continuances of the return day, which continuances were granted (Exhibits 13 and 13-A to Answer and Return of Cable A. Wirtz, R. 93), without Petitioners taking any steps whatsoever to seek correction of such alleged deficiencies by Judge Wirtz. Instead the Petitioners chose to seek relief by Petition for Writ of Prohibition which questions only the *jurisdiction* of the lower court to act and not the form or terms of the Temporary Restraining Order.

The statement in the last paragraph on pages 6-7 of the Petition, quoting the Territorial Supreme Court's alleged interpretation of the definition of "court of the United States" in the Norris-LaGuardia Act, is incomplete, because it takes but one paragraph of the opinion of the Territorial supreme court out of its context. All that that court really held was that the Norris-LaGuardia Act did not apply to Territorial circuit courts, and, of course, the reasoning of

the court is immaterial if its conclusion is correct, as we submit that it is.

Finally, footnote No. 3 to this paragraph, on p. 6 of the Petition, further strays from the true issues of this case. There is no basis whatsoever, from the record or otherwise, for the inference drawn by this note, immaterial though it obviously is, that *"as a result"* of the unreported Territorial circuit court decision in *Neves v. Reber* in 1938, which is not even quoted in the Petition, "the application of the Norris-LaGuardia Act to territorial circuit courts was not questioned." Territorial circuit court decisions are neither printed, officially indexed except by title, nor regarded as binding precedents in the Territory.

REASONS FOR GRANTING THE WRIT

The Reasons Nos. I to VI, inclusive, set forth in the Petition (pp. 7-13) are inaccurate in their statements or assumptions as well as unsound in their reasoning and present no substantial basis for granting the Writ. This will be brought out in the Argument *infra,* taking each such reason in order.

SUMMARY OF ARGUMENT

Reason No. I is unsound, for construction of the term "court of the United States," used in sec. 13 (d) of the Norris-LaGuardia Act, as not including territorial courts is not new, and the application of the Act to the Federal district court in Hawaii is not involved in this proceeding, although it can be held applicable through the adoptive provisions of Sec. 86 of the Hawaiian Organic Act, thereby giving full effect to the public policy expressed in the Act.

There is no conflict between the lower court's decision and the decisions of this court, particularly the *Hutcheson* case as alleged in Reason No. II.

Reason No. III ignores the autonomy granted by Congress to territorial courts and the territorial legislature, and the separation between those courts and the federal

district court in Hawaii. It is clear, both from the terms of the Norris-LaGuardia Act and its legislative history, as well as the decisions of this court construing the same, that our separate system of autonomous territorial courts was never intended to be covered by that Act.

Reason No. IV is unsound, because, assuming that all acts enumerated in Sec. 4 of the Norris-LaGuardia Act are legalized under all laws of the United States (as to which there is some doubt), and that the rights granted by that Act are substantive, as contended, the question of infringement of the alleged substantive rights is not raised by the record, nor do those alleged substantive rights supersede the local law of the Territory.

Reason No. V alleging "apparent conflict" of the decision below with that of a three-judge district court in *ILWU v. Ackerman,* Civil Nos. 828 and 836, U.S.D.C. Hawaii, is trivial and obviously untrue.

As to Reason No. VI, neither (1) the question as to the reasonableness of the temporary restraining order issued by the territorial circuit court sought to be restrained by writ of prohibition, or of its constitutionality or validity under the Clayton and Norris-LaGuardia Acts by reason of its form and effect, nor (2) the right of the territorial circuit court to proceed on separate criminal contempt charges, is in issue in this proceeding.

Hence, no substantive reason exists for granting certiorari.

ARGUMENT

REASON NO. I (PETITION 7-8)

In Paragraph I under the heading "Reasons for Granting the Writ," Petitioners assert that the court below decided a federal question of substance never determined by this Court. This is so only in the limited sense that the Norris-LaGuardia Act has not heretofore been held inapplicable to territorial circuit courts. However, it is not true insofar

as concerns the general ruling that the term "court of the United States" does not include territorial courts, as to which there is a multitude of applicable rulings of this Court. See *American Ins. Co. v. Canter* (1828), 1 Pet. 511, 546, 7 L. ed. 242, and many other cases summarized in *McAllister v. United States* (1890), 141 U.S. 174, 35 L. ed. 693, 11 S. Ct. 949, cited by the court below (R. 107). See also *Mookini v. U. S.* (1938), 303 U.S. 201, 82 L. ed. 748, 58 S. Ct. 543; *Young v. U. S.* (C.C., W.D., Okla., 1910), 176 F. 612, 615.

The further statement under this paragraph (Petition 8) that "the effect" of the lower court's "decision is to deny to . . . residents of . . . territories and possessions . . . the protection and benefits of a most important national labor law, and to becloud the rights of these persons under other interrelated federal laws," is likewise misleading. All that the Territorial supreme court and the 9th Circuit Court of Appeals held in ultimate effect was that the Norris-LaGuardia Act did not apply to the *purely local circuit courts* of the Territory of Hawaii. Whether the Act applies to the Federal, though not constitutional, United States District Court in the Territory, was not necessary to be, and was not, decided. However, there is no good reason, if and when that question is presented, why it should not be held that, through the adoptive provisions of Sec. 86 of the Hawaiian Organic Act (31 Stat. 158, 48 U.S.C. 641-5, amended June 25, 1948, c. 646, Pub. Law 773, 80th Cong., 2d Sess., 1948, Sec. 8), the Norris-LaGuardia Act became applicable to such Federal district court in this Territory, thereby giving *the same full scope* to the latter Act in Hawaii as in any State of the Union. The Act of June 25, 1948, Sec. 8, supra, amending Sec. 86 of the Hawaiian Organic Act, makes this even clearer now.

The statement that this decision beclouds the rights of territorial residents under other interrelated federal laws (Petition 8) is a red herring. It has no such effect. The

alleged "interrelated federal laws" are the Sherman and Clayton Acts. These two Acts can be given full scope in the Territory of Hawaii by holding that they are applicable to the Federal district court in Hawaii under the adoptive provisions of Sec. 86 of the Hawaiian Organic Act supra, without including within their scope the purely local territorial circuit courts.

Nor do we concede that the court below used a "narrow procedural approach" (Petition 8) in construing the Norris-LaGuardia Act. On the contrary, the court adopted the obvious and natural meaning of the terms used in the Act and gave them the full scope that the context of the Act warranted — a meaning also fully sustained by the legislative history of the Act as a law primarily designed to operate upon the jurisdiction and procedure of Federal courts.[1]

Finally, the contention (Petition 8) that the lower court's construction of the Act "permits courts created by Congress to flout the public policy of the United States declared in the Act, and results in giving to legislative courts created by Congress in the territories and possessions greater power in the issuance of injunctions in labor disputes than constitutional federal courts have" is unsound. The public

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[1] The title to the Act is "An Act to amend the judicial code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes" (47 Stat. 70). Mr. Justice Frankfurter, to whose views great deference was paid by Congress in enacting the Act, as shown by the House and Senate Judiciary Committee reports (Senate Report No. 163, 72d Cong., 1st Sess., p. 3; House Report No. 669, 72d Cong., 1st Sess., p. 12) in his partial dissent in the *United States v. United Mine Workers* (1947), 330 U.S. 258, 313, 91 L. ed. 884, 923, 67 S. Ct. 677, 705-6) said:

. . . The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act "to define and limit the jurisdiction of courts sitting in equity." It *does not deal with the rights of parties* but with the *power of the courts.* Again and again the statute says "no court shall have jurisdiction," or an equivalent phrase. Congress was concerned with the *withdrawal of power from the federal courts* to issue injunctions in a defined class of cases. (Emphasis added.)

policy declared by the Act is expressly limited to "courts of the United States" as defined in that Act and the so-called "substantive" effect of the Act is also expressly limited to any "law of the United States." It was never intended to go any further than to affect the jurisdiction and procedure of those courts and to limit the coverage of Federal criminal statutes over certain labor dispute activities. A court not intended to be covered by the Act operating in a field of local law not intended to be covered by the Act, cannot therefore be "flouting" the public policy declared in the Act. Furthermore, there are numerous respects in which our local territorial circuit courts, being courts of general jurisdiction, ever since their creation have enjoyed broader powers than the United States District Court in Hawaii, or Federal courts in the States, so that such a situation is the rule rather than the exception. For instance, until the enactment of the new Judicial Code, when for the first time diversity of citizenship (28 U.S.C. 1332) was made a ground for Federal jurisdiction in a Territory (See *Avery v. King* (1900) 1 U.S.D.C. Hawaii 12), many cases in Hawaii usually cognizable in the Federal district courts by reason of such diversity could not under any circumstances be tried in the Federal courts, but were triable exclusively in the local territorial courts.

REASON NO. II (PETITION 8-9)

Ground No. II (Petition 8-9) contends that the lower court's decision is in conflict with the decisions of this court, citing particularly *United States v. Hutcheson* (1941) 312 U.S. 219, 61 S. Ct. 463, 85 L. ed. 788, and implies that the lower court's holding that territorial circuit courts are not covered by the Norris-LaGuardia Act would effect the "absurd result . . . that an unamended Sherman Act and an unamended Clayton Act are in force in the territories and possessions," although the *Hutcheson* case held that the Norris-LaGuardia Act in effect amended the Sherman and

Clayton Acts. Both the statement and its implication are untrue. The Sherman and Clayton Acts are undoubtedly in force in Hawaii, and, whatever may be their scope, they are enforceable, not in the local circuit courts, but in the Federal district court in Hawaii. Hence giving the same scope to the Norris-LaGuardia Act in Hawaii as the Sherman and Clayton Acts which they amend, involves nothing more than the possible extension of the inhibitions of the Norris-LaGuardia Act to the Federal district court in Hawaii — the only court in Hawaii to which the Sherman and Clayton Acts extend. The trouble with this contention of Petitioners is that it attempts to imply from the coverage of the Sherman and Clayton Acts over "commerce," "persons" and *Federal courts* in a Territory, an intent to cover *both Federal and local circuit courts* for purposes of the Norris-LaGuardia Act, which is a palpable *non-sequitur*.

REASON NO. III (PETITION 9-10)

Ground No. III (Petition 9-10) is largely a repetition of Grounds Nos. I and II, supra, and equally without merit.

In connection with determining the meaning of the term "court of the United States," in the Norris-LaGuardia Act, so as to determine its possible application to courts of Hawaii, it should be remembered that the Norris-LaGuardia Act is a general Federal law, applicable generally to Federal courts, and that the Hawaiian Organic Act — the special Federal law applicable specially and only to Hawaiian courts — can not be ignored. Throughout the entire history[2] of the Territory of Hawaii, Congress has

[2] See HAWAIIAN COMMISSION MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE REPORT OF THE HAWAIIAN COMMISSION, APPOINTED IN PURSUANCE OF THE "JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES," APPROVED JULY 7, 1898; TOGETHER WITH A COPY OF THE CIVIL AND PENAL LAWS OF HAWAII (Document No. 16, 55th Cong., 3d. Sess.), pp. 162-4;

consistently taken particular care to leave to the Territorial legislature and the Territorial courts the question as to when and upon what evidence our courts of law and equity may exercise their powers, and the procedure of those courts. And the history[2] and terms[3] of the Hawaiian Or-

and Report No. 305, p. 19, of House Committee on Judiciary on H. R. 2972 (House Reports, Vol. 2, Nos. 246-486, Misc., 56th Cong., 1st Sess., 1899-1900, Sr. No. 4022), which bill was later incorporated by the House into S. 222, which was finally enacted as the Hawaiian Organic Act (see House Report No. 549 on S. 222; House Reports, Vol. 3, Nos. 587-807, Misc., 56th Cong., 1st Sess., 1899-1900, Sr. No. 4023). This Report No. 305, among other things stated, at p. 21:

> To this report may be added that the foundation of the legal system of the islands is the common law of England, and that the penal laws and practice is codified, and there are no penal offenses except those enumerated in the code. The civil law in its practice and procedure is partially codified.
>
> In view of the foregoing report it must be considered wise and safe to provide for the organization of the Territorial courts of the Territory of Hawaii by substantially continuing them as now existing under the Republic of Hawaii, and this has been done in the present bill. The reasons also stated in the report for the separation of Federal and Territorial jurisdiction and the creation of a new judicial district of the United States for the islands and the establishment of a district court sufficiently explain and sustain the provisions for such a court in section 87 of the bill.

The debates on the bill in Congress emphasize even more strongly the Congressional intent to set up separate court systems in Hawaii, one purely Federal, and the other purely Territorial or local, just as in a State. 33 Cong. Rec. 1871, 1929, 1932-4, 2025, 2123-4, 2133, 2189, 2191-4, 2388-9, 2397, 2398-2400, 2441, 3771, 3801, 3859, 4358, 4649 and 4733, the last being a conference report on the bill which stated:

> The amendments to Section 86 in effect separate the Territorial from the Federal jurisdiction in courts of the Territory of Hawaii, as provided in the House bill, the provision for appeals from the supreme court of Hawaii to the ninth judicial circuit being stricken out and the jurisdiction of the United States district and circuit courts is conferred upon the Federal court established.

Excerpts from some of the foregoing citations of the Congressional Record are printed in Appendix B to this brief.

[3] The Hawaiian Organic Act fully recognized and perpetuated this separate autonomy of the Territorial legislature and courts. See Secs. 10, 11, 55, 81, 82 and 83, and 86 (48 USCA 501, 505, 562,

ganic Act indicate an unmistakeable Congressional intent to grant to the Territorial legislature and courts practically the same autonomy as that of a State with respect to jurisdiction and procedure of the local courts, among other things, and to entirely separate the jurisdiction and procedure of the Federal court (the United States District Court for the District of Hawaii) in Hawaii from that of local Territorial courts. Hawaii is unique in the history of all Territories of the United States in respect of this autonomy, granted from its very inception.[4]

631, 632, 635, 641-5; Appendix A hereof); *U. S. v. Bower* (1914) 4 U.S.D.C. Haw. 466-7. In sec. 86 (48 USCA *641-5*) supra, Congress differentiated expressly between "courts of the United States," meaning the United States District Court for Hawaii, and "courts of the Territory," and provided that the relationship between the two should be the same as that between Federal courts and State courts in a State. This autonomy has been recognized and emphasized in numerous decisions.

In *Kawananakoa v. Polyblank* (1907) 205 U.S. 349, 51 L. ed. 834, 27 S. Ct. 526, this court held that by the Organic Act Congress organized for the Territory a sovereign government, having immunity from suit without its consent, and that such a government is itself "the fountain from which rights ordinarily flow."

In *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, 260-263, 82 L. ed. 235, 242-3, 58 S. Ct. 167, 170-171, the court held provisions of the Puerto Rican Organic Act similar to ours to be "as broad and comprehensive as language could make it," and that the aim of such acts was to grant "full power of local self-determination, with an autonomy similar to that of the states..."

See, also, *In re Craig* (1911) 20 Haw. 483, 490, *Yerian v. Territory of Hawaii* (9 Cir. 1942) 130 F. 2d 786, 788, as to *power of taxation and police power.*

This legislative autonomy extends to the courts. Referring to the Organic Act the United States Attorney General has said (emphasis added):

> Indeed, it would be difficult to frame language more clearly subjecting to legislative change *the whole matter* of "the *laws of Hawaii* heretofore in force *concerning courts and their jurisdiction and procedure*" and "relative to the judicial department..."
>
> 23 Ops. Attys. Gen. U.S. 539, 543.

[4] The courts have held that the *jurisdiction and powers of our Territorial courts are practically those of a State court,* that the relationship between the Territorial courts on the one hand and

The contention (Petition 9) that the lower court's construction of sec. 13 (d) of the Norris-LaGuardia Act (29 U.S.C, 113 (d) reduced the legislative definition to the absurd conclusion that "court of the United States" means "court of the United States" ignores the real reason why Congress enacted the definition reading:

> "The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

That reason, of course, was that Congress could not affect the constitutionally conferred original jurisdiction of the Supreme Court (as for instance where a State might sue for an injunction in a labor case) and used this definition to avoid any question as to constitutionality,[5] as well as to insure that District of Columbia courts, theretofore almost universally regarded as not being constitutional inferior

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the Federal courts, including the U. S. District Court in Hawaii, is substantially the same as that between State courts and Federal courts in a State, and that in these respects the purely Territorial judicial system was unique in the history of Territories. See *Hind v. Wilder's S. S. Co.* (1900) 13 Haw. 174, 182; *Wilder's S. S. Co. v. Hind* (9 Cir. 1901) 108 F. 113, 114-116; *U. S. v. Bower* (1914) 4 U.S.D.C. Haw. 466, 467.

See also *Yeung v. Territory of Hawaii* (9 Cir., 1942) 132 F. 2d 374, 378 as to the complete separation of Territorial and Federal courts.

Furthermore, this court has, particularly with respect to a Territory having a dual system of courts (Territorial and Federal) like Hawaii's, emphatically adopted the rule that the decisions of such Territorial courts on matters of local law or local concern are generally controlling on the Federal appellate courts.

> *Waialua Agricultural Co. v. Christian* (1938) 305 U.S. 91, 106-109, 83 L. ed. 60, 70-72, 59 S. Ct. 21, 29-30.

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[5] See remarks of Sen. Blaine, 75 Cong. Rec. 4625-6; Sen. Norris, Id. 4682; Rep. McKeown, Id. 5486; Rep. Garber, Id. 5493; Senate Report No. 163, of the Senate Judiciary Committee, 72d Cong., 1st Sess., pp. 10-11, 25; and H. Rept. No. 669, of the House Com-

courts, and hence possibly not "courts of the United States would be unquestionably included."[6]

These circumstances, together with (1) the fact, referred to by the lower court (R. 108-9), that both the committee reports and the debates on the Act indicate clearly that only Federal inferior or constitutional courts were intended to be covered, (2) the fact that no abuses by territorial courts were even mentioned nor were territorial courts remotely considered or referred to, (3) the well-defined meaning of the term "court of the United States" as including only consitutional courts, and, finally, (4) the inconsistencies of the Act itself (Sec. 10 and 11) with the interpretation claimed by the Petitioners pointed out in the decision below

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mittee on the Judiciary, 72d Cong., 1st Sess., pp. 3-5, 11, which, among other things, says, with reference to sec. 13- (d) of the Norris-LaGuardia Act:

> The definitions also, as above stated, limit the act to courts of the United States whose jurisdiction has been conferred or limited by act of Congress; that is to say, the inferior Federal courts.

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[6] The words "including the courts of the District of Columbia" appear to have been inserted in the definition because of the language of the Supreme Court in *Ex Parte Bakelite Corporation*, 279 U.S. 438, 450, 49 S. Ct. 411, 413, 73 L. ed. 789, 793, decided three years before the Norris-LaGuardia Act was passed, to the effect that the courts of the District of Columbia were legislative rather than constitutional courts. The *Bakelite* decision attracted considerable attention and was widely written up in the law reviews in 1930, two years before the Norris-LaGuardia Act was passed as supporting this view. See 24 Ill. L. Rev. 820 (Mar. 1930); 10 B. U. L. Rev. 81 (Jan. 1930); 28 Mich. L. Rev. 485, 518, Note 87 (Mar. 1930). In an article in 43 Harv. L. Rev. 894, entitled "Federal Legislative Courts," the author, W. G. Katz, who prepared the same "in connection with graduate study in Harvard Law School in seminar courses of Professor Felix Frankfurter" (See Note, p. 894 of this article) at page 902 states: "It has thus been settled that all territorial courts and all courts of the District of Columbia, even those whose justices hold office during good behavior, are legislative courts." It was not until the decision in *O'Donoghue v. United States* (decided in 1933, a year after the Norris-LaGuardia Act was enacted) 289 U.S. 516, 77 L. ed. 1356, 53 S. Ct. 740, that the *Bakelite* ruling was held to be dictum and it was finally settled that District of Columbia courts were constitutional courts.

(R. 109-11) — all make it amply clear that the lower court adopted the only possible interpretation of the term "court of the United States" by excluding the territorial circuit courts from their purview. If, therefore, the Norris-LaGuardia Act applies to the Federal district court in Hawaii, which is a question not raised by the issues of this case, it applies through the adoptive provisions of sec. 86 of the Hawaiian Organic Act, supra, which are ample to achieve that result (*Balzac v. Porto Rico* (1922) 258 U.S. 298, 302, 66 L. ed. 627, 629, 42 S. Ct. 343, 344) without stretching the term "court of the United States" beyond its well-settled meaning. Hence the fears of Petitioners that a different effect might be given to the Clayton and Sherman Acts than to the Norris-LaGuardia Act in the Territory by the lower court's decision are unfounded.

REASON NO. IV (PETITION 10-11)

In Ground No. IV Petitioners in substance make claims, which for convenience we divide into four contentions: (1) that all acts enumerated in Sec. 4 of the Norris-LaGuardia Act are legalized under all laws of the United States; (2) that the rights granted by that Act are substantive; (3) that the courts below refused to give effect to such rights when they refused to prohibit the territorial circuit court from proceeding further in the injunction matter; and (4) that specifically the temporary restraining order issued by the territorial circuit court violated those substantive rights and that this was sufficient to require the issuance of a writ of prohibition forbidding the circuit court to proceed further in the injunction suit.

Assuming, without admitting, that claims (1) and (2) above are correct (and there certainly is doubt as to the correctness of Claim No. (1), in view of *Allen Bradley Co. v. Local Union No. 3* (1945) 325 U.S. 797, 89 L. ed. 1939, 65 S. Ct. 1533, which held that the immunization of labor unions under Sec. 4 of the Norris-LaGuardia Act did not prevent the specified acts of the union from being violations of the Sherman Act itself if the union joined with employers in creating a monopoly), the conclusions of Claims Nos. (3) and (4) supra do not follow.

Claims Nos. (3) and (4) supra make the assumptions (a) that the present proceeding for a writ of prohibition against the territorial circuit judge and the other respondent herein raises the issue that the temporary restraining order goes too far and denies a substantive right granted by the Norris-LaGuardia Act; and (b) that the alleged "legalization" of all labor union activities superseded any laws or law, not only of the United States, but of the Territory as well (using "laws" or "law" of the Territory in the sense of both local statutory law and the local general or common law) which might otherwise impose criminal or civil liability for acts done in the course of such activities, not involving

fraud or violence. That both of these assumptions are false is demonstrated by the following arguments:

1. NOWHERE IN THE RECORD IS THE QUESTION OF ALLEGED INFRINGEMENT OF SUBSTANTIVE RIGHTS RAISED.

R. L. Hawaii 1945, Sec. 10271, provides, with respect to the requirements in a petition for a writ of prohibition, that

> The defendant who applies for this writ shall apply by petition addressed to the justices of the supreme court, or to any single justice thereof, or to a circuit judge, stating the cause and nature of the action brought against him, and *showing that the inferior court is not competent to try it, or that it has exceeded its jurisdiction in the trial or hearing of such action,* which petition shall be verified by the oath of the applicant or by some person on his behalf cognizant of the facts. (Emphasis added.)

The Territorial supreme court, in *Carter v. Gear* (1905) 16 Haw. 412, 417-418, said:

> The propriety of issuing the restraining order in this instance cannot be inquired into upon prohibition. The question of power is the only one that can be considered . . . We cannot find that a circuit judge sitting in probate is absolutely without such power under the particular circumstances of this case so as to justify the issuance of a writ of prohibition.

In *Bandini Petroleum Co. v. Superior Ct.* (1931) 284 U.S. 8, 76 L. ed. 136, 52 S. Ct. 103, which was an appeal from the refusal of the California appellate courts to issue a writ of prohibition to a California trial court which had issued a temporary injunction under a California Statute for conservation of natural resources, the Supreme Court held that the writ of prohibition is not available as a substitute for an appeal from a court having jurisdiction; and that a petition for such a writ to restrain the enforcement of an injunction issued by another court cannot, by annex-

ing to and making a part of the petition the pleadings in the injunction suit and the affidavits presented upon the hearing of the application for preliminary injunction, or by a characterization of the evidence thus adduced, or by pleading the conclusions derived therefrom, substitute the court to which application for the writ is made for the court to which the writ is sought, in the determination of the facts, or of the law addressed to the facts, which should properly be considered by the latter tribunal.

If, therefore, the second circuit court had jurisdiction to issue an injunction in a labor dispute without complying with the formal and procedural requirements of the Norris-LaGuardia Act — on the theory sustained by the territorial supreme court that it was not a "court of the United States" within the meaning of that act — the propriety of the issuance of the injunction under the actual circumstances of the case would not, under the foregoing decisions, be a proper subject for the writ of prohibition, at least unless the injunction was absolutely void.

However, no claim was made before the supreme court of the Territory in the Petition for Writ of Prohibition (R. 15-21) or elsewhere in the recond, or even in the assignments of error (R. 5-7) that could be construed as a claim that substantive rights were infringed by the terms of the injunction. The only claim made throughout the entire case was that the petitioner in the injunction suit in the territorial circuit court had failed to make certain allegations, and the circuit court had failed to require compliance with or make findings in accordance with certain procedural requirements specifically named in the Petition of Writ of Prohibition, which Petitioners herein claimed were required by the Norris-LaGuardia Act, and which requirements Petitioners herein claimed were applicable directly to the territorial circuit court on the sole ground that it was literally a "court of the United States" under that Act.

The return of Judge Wirtz to the alternative writ of prohibition denied that the Second Circuit Court is a "court of the United States" within the meaning of the Norris-LaGuardia Act, (Paras. III-V, VIII; R. 46-50, 54-55). Likewise, the return of the Maui Agricultural Co., Ltd., denied that the Second Circuit Court was a "court of the United States" as defined in the Norris-LaGuardia Act and denied the act's applicability to a circuit court of the Territory (Paras. II and III; R. 56). Judge Wirtz's return further alleged that the temporary restraining order was properly and lawfully issued

> for good and sufficient cause and in accordance with the laws, practice and rules of court applicable to said Circuit Court and the Judge thereof presiding at chambers in equity. (Para. VIII; R. 54.)

The Petitioners made neither formal nor informal denial of the allegations of the returns, including the last quotation above from Judge Wirtz's return, and the Territorial Supreme Court found that the procedure followed by Judge Wirtz was "*admittedly* in conformity with the laws of the Territory," the procedure required by the Norris-LaGuardia Act being held not applicable to such circuit court as not being a "court of the United States" (Op. Terr. Sup. Ct., R. 58; on Rehearing, R. 77).

Nor do the assignments of error (R. 5-7) raise any contention of deprivation of substantive rights, or point out in any way any alleged substantive rights of which appellants have been deprived. Hence, the only issue before the territorial supreme court was not whether the terms of the restraining order itself deprived the appellants herein of substantive rights, but whether the Second Circuit Court was a "court of the United States" as defined in that Act. For this reason, it is submitted that the question of whether the Norris-LaGuardia Act, as construed in the *Hutcheson* case, supra, confers substantive rights is absolutely immaterial to the issues of this case.

However, an analysis of the "substantive rights" argument of Petitioners will make its immateriality to this case even more clear.

2. THE ALLEGED SUBSTANTIVE RIGHTS RELATE TO FEDERAL AND NOT TO TERRITORIAL LAW.

In the first place, it is clear from the Federal statutes themselves, which are relied upon by Petitioners, that the substantive rights granted by Sec. 4 of the Norris-LaGuardia Act and Sec. 20 of the Clayton Act relate to Federal law only and do not affect the law of the Territory of Hawaii.

Section 20 of the Clayton Act (29 U.S.C. 52) contains two paragraphs:

The first paragraph provides that, with certain exceptions, no restraining order or injunction shall be granted by any court of the United States in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment. The first paragraph relates to procedural matters only, i.e., it restricts and defines injunctive relief which may be granted by courts of the United States in certain types of cases.

The second paragraph of Section 20 contains the critical provisions, and is as follows (italics supplied):

> "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peaceably obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or

> from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

The second paragraph refers to restraining orders and injunctions mentioned in the first paragraph, i.e., restraining orders and injunctions issued by courts of the United States in certain types of cases. The second paragraph provides that no such restraining order or injunction shall prohibit certain specified acts. To this extent the second paragraph, like the first paragraph, relates to procedural matters only, i.e., it limits the power of courts of the United States to grant injunctive relief in certain types of cases. However, the last clause of the second paragraph provides that none of the specified acts shall be considered or held to be violations of any law of the United States. The last clause is the basis of the substantive rights claimed under Section 20.

The motive behind the adoption of Section 20, including the last clause of the second paragraph thereof, was to restrict the issuance of restraining orders and injunctions in suits under the Sherman Act (15 U.S.C. 1-7), and also to amend the substantive provisions of the Sherman Act to provide that the specified acts should not be deemed to be in violation of the Sherman Act. And because of a suggestion made to Congress that certain judges had relied on federal statutory provisions other than the Sherman Act as justifying the issuance of injunctions in labor dispute

cases it was provided in the last clause of the second paragraph that none of the specified acts should be considered or held to be in violation of *any* law of the United States – rather than merely in violation of the Sherman Act.

The legislative history of the last clause is extremely revealing on this point. The Clayton Act was first introduced into and passed by the House of Representatives. As the Act went from the House of Representatives to the Senate, the present Section 20 was Section 18. At that time the language of the last clause was as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be unlawful."

The Senate Committee recommended that the word "unlawful" be eliminated and that the words "violations of the antitrust laws" be substituted. As so amended the language of the last clause would have been as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be violations of the antitrust laws."

On the floor of the Senate an amendment was moved and adopted to substitute the words "any law of the United States" for the words "the antitrust laws." By this amendment the final language was adopted, as follows:

> "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The debate on the floor of the Senate with respect to the language of the last clause clearly indicates the reasons for the changes. The important point is the reason given for eliminating the original language, to the effect that none of the acts specified in the paragraph should be considered or held to be "unlawful." It was pointed out that under the original language it might be held that none of the specified acts could be proscribed by state common law or state

statutory law. It was further pointed out that the first of the specified acts was "terminating any relation of employment," and that if the termination of any relation of employment was declared by Congress to be not unlawful generally, then it might be impossible for an employee to obtain redress in a state court in case an employer violated a contract of employment by discharging the employee contrary to the terms of the contract. The discussion and the changes made in the language of the last clause, establish that the purpose of the last clause was merely to modify the substantive provisions of the Sherman Act (and of any other federal legislation that might otherwise be interpreted as prohibiting any of the specified acts) so that the provisions of the Sherman Act (and of any such other federal legislation) should not be deemed to prohibit any of the specified acts. See Congressional Record, 63rd Congress, 2nd Session, Vol. 51, Part 14, pages 14365-14367.

The relationship of the substantive aspects of Section 20 of the Clayton Act to the general provisions of the Sherman Act is pointed out by the Supreme Court in *United States v. Hutcheson* (1941) 312 U.S. 219, 229-230, 236, 85 L. ed. 788, 791-2, 795, 61 S. Ct. 463, 465, and 468, in the following language:

> . . . Section 20 of that Act, . . . withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them — since the use of the injunction had been the major source of dissatisfaction — and also relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."
>
> * * *
>
> The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such *allowable conduct* from the taint of being a "violation of any law

> of the United States," including the Sherman Law.
>
> • • •
>
> It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure.

It is clear that the Supreme Court, in referring to "allowable conduct," meant conduct which was not in violation of any federal legislation, including the Sherman Act.[7]

Numerous decisions hold that Section 20 does not prohibit injunctions in labor dispute cases in state courts and does not in any way modify substantive state law. See, for instance, *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U.S. 287, 85 L. ed. 836, 61 S. Ct. 552; *Carpenters & Joiners Union v. Ritter's Cafe* (1942) 315 U.S. 722, 738-739, 86 L. ed. 1143, 1153-4, 62 S. Ct. 807; *Weyerhaeuser Timber Co. v. Everett Dist. Council* (1941) 11 Wash. 2d 503, 119 Pac. 2d 643; *Isolantite v. United Electrical Etc., Workers* (1942) 132 N.J. Eq. 613, 29 Atl. 2d 183; *Western Electric Co. v. Western Electric Employees Association* (1946) 137 N.J. Eq. 489, 45 Atl. 2d 695, and *U. S. Elec. Motors v. United E. R. & M. Workers* (1946) 166 Pac. 2d 921, Super. Ct. of Calif., L. A. Co.

The situation must be the same in a territory as in a state. When Congress provided that the Sherman Act (and any other federal legislation) should not be deemed to prohibit "terminating any relation of employment," to take one example, it no more intended to eliminate the common law or statutory law of a territory with respect to rights

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[7] That the substantive provisions of Section 20 of the Clayton Act operate only in the field of federal law is assumed by the Supreme Court. In *Allen-Bradley Co. v. Union* (1945), 325 U.S. 797, 807, 89 L. ed. 1939, 1947, 65 S. Ct. 1533, 1538-1539, the Supreme Court referred to the specific acts listed in Section 20 of the Clayton Act as having been declared by Section 20 "not to be violations of federal law."

and remedies for breach of contract than it intended to eliminate the common law or statutory law of a state with respect to similar rights and remedies.

The construction contended for by Petitioners would result in leaving the Territory absolutely helpless to pass criminal laws to protect the peace, public welfare and safety, or through the territorial courts to protect by injunction, or even by suit at law, private rights, in any case which grew out of a labor dispute, which did not involve fraud or violence.[8] There is no sound basis for such contention, particularly in view of the general rule that "an intention to supersede the local law (of a Territory) is not to be presumed, unless clearly expressed."

3. THE TERM "LAW OF THE UNITED STATES" AS USED IN SEC. 20 OF THE CLAYTON ACT AND IN THE DECISION IN THE HUTCHESON CASE, HAS A WELL-DEFINED MEANING, RECOGNIZED BY THE COURTS AND BY CONGRESS, WHICH DOES NOT INCLUDE THE LAW OF A TERRITORY.

A Territorial law is not a "law of the United States." *Maxwell v. Fed. Gold & Copper Co.* (8 Cir. 1907) 155 F. 110, 112; *Ex parte Moran* (8 Cir. 1906) 144 F. 594, 603. Similarly, it has been held that even an Act of Congress peculiarly local to the District of Columbia is not a "law of the United States." *Amer. Security & Trust Co. v. Comrs. of D. C.* (1912) 224 U.S. 491, 56 L. ed. 856, 32 S. Ct. 553; *Wash., Alexandria & Mt. Vernon Ry. Co. v. Downey* (1915) 236 U.S. 190, 59 L. ed. 533, 35 S. Ct. 406. See, also *People of Puerto Rico v. Rubert Hermanos, Inc.* (1940) 309 U.S. 543, 84 L. ed. 916, 60 S. Ct. 699, holding that sec. 39 of the Organic Act of Puerto Rico is not one of the "laws of the United States" within the purview of that provision of sec. 256 of the Judicial Code (28 USCA 371, now sec. 1355 of

[8] Actually, as stated ante, p. 3, violence was both alleged and proved before Judge Wirtz.

the New Judicial Code in revised form), which vested exclusively in the courts of the United States jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States."[9]

REASON NO. V (PETITION 11-12)

On its face, this alleged reason is so flimsy as to be hardly worthy of notice. It seizes upon a mere dictum in a case (not yet reported and not quoted in full) involving a crim-

[9] Congress itself distinguishes between laws of the United States and laws of a Territory, including Hawaii, in numerous Acts, including the following:

> The word "person," or "persons" . . . shall be deemed to include corporations and associations existing under or authorized by the *laws of* either *the United States,* the *laws of any of the Territories,* the *laws of any State,* or the *laws of any foreign country.* (Emphasis added.)
>
> Sherman Act, sec. 8, 15 USCA 7.
> Clayton Act, sec. 1, 15 USCA 12.

> Every contract, combination . . . is hereby declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal contracts . . . when contracts . . . of that description are lawful as applied to intrastate transactions, under any *statute, law,* or public policy now or hereafter in effect in any *State, Territory* or the District of Columbia . . . (Emphasis added.)
>
> Sherman Act, sec 1, as am. Aug. 17, 1937, 50 Stat. 693, 15 USCA 1.

See, also the following sections of the Hawaiian Organic Act *supra* making the same distinction:

Sec. 1 (48 U.S.C. 493) defining "laws of Hawaii"; sec. 5 (48 U.S.C. 495); extending to Hawaii all "laws of the United States" not locally inapplicable; sec. 6 (48 U.S.C. 496) continuing in effect, with certain exceptions, the "laws of Hawaii" not inconsistent with the Constitution or "laws of the United States"; sec. 55 (48 U.S.C. 562) extending legislative power (which is nothing more than the power to make "laws of Hawaii") to the local legislature over all rightful subjects of legislation not inconsistent with the Constitution and "laws of the United States" locally applicable; sec. 81 (48 U.S.C. 631) continuing in effect until the local legislature otherwise provides, the "laws of Hawaii" concerning the several courts and their jurisdiction and procedure; and sec. 83 (48 U.S.C. 635) continuing in effect, with certain qualifications, the "laws of Hawaii" relative to the judicial department.

inal prosecution decided by a three-judge district court not even having coordinate jurisdiction with the lower court, having no bearing upon the issues of this case, and which Petitioners expressly admit "does not involve the Norris-LaGuardia Act" (Petition 12) — as the basis for the allegation that the decision of the court below and the decision of the three-judge federal district court in Hawaii are in "apparent conflict."

As a matter of fact, the dictum in that three-judge decision was not even accurate in its evaluation of Judge Wirtz's decision, for Judge Wirtz had actually found that the acts of "threatened violence" were "borne out by the testimony and the affidavits on file," and had held in effect that the granting of the motion for a temporary restraining order was "for the sole purpose to prevent rioting and violence." (R. 41) Hence Judge Wirtz's remark that he would "follow the pattern set forth in the (unlawful assembly) statute and permit but three pickets," was nothing more than a finding that he found that under all the circumstances the number three mentioned in that statute was a reasonable limit for the allowable pickets at each point of ingress and egress.

REASON NO. VI (PETITION 12-13)

Petitioners in this ground no. VI first imply that the temporary restraining order of the Territorial circuit court prohibited peaceful picketing "in company camps used for residence purposes." As already pointed out ante, nowhere in the record is it shown that the areas covered by the order were company camps used for residence purposes, nor was this urged *at any time below* as a ground for the issuance of the writ of prohibition.

This ground No. VI also contends that because of the alleged prohibition of peaceful picketing in "company camps used for residence purposes" and otherwise circumscribing the right of peaceful picketing, the temporary

restraining order was "void on its face" under the Clayton and Norris-LaGuardia Acts, and the Constitution. This proposition is unsound for at least three reasons: First, as above stated, neither the record nor the order show on their face that the restraint was on mass picketing in company camps used for residence purposes. Secondly, in their Petition for Rehearing before the Territorial supreme court, Petitioners themselves stated: "The lawfulness of the Temporary Restraining Order under the laws of the Territory, and the Constitution and laws of the United States—other than the Norris-LaGuardia Act—is not in issue and was not argued before this court in this cause." (R. 73.) Thirdly, it is well settled that for acts of flagrant violence, even peaceful picketing may be temporarily enjoined. *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U.S. 287, 85 L. ed. 836, 61 S. Ct. 552.

If the limit of three pickets at each point of ingress to and egress from the property of the company respondent herein, or the other restrictions on picketing, were unreasonable under the circumstances actually obtaining at the time, the remedy of the Petitioners herein was, not to attack Judge Wirtz's jurisdiction to act in the matter, which was clear, but to apply to Judge Wirtz and make a showing of such alleged unreasonableness and request him to set aside or amend the order so as to fix a reasonable number of pickets or eliminate or modify any restrictions considered unduly restrictive.

Petitioners had 11 days from the issuance of the restraining order to the return day (October 28, 1926) fixed in the Order to Show Cause (R. 36, 91), and themselves requested and secured two additional continuances for a total of 16 additional days (R. 93), making a total of 27 days within which they could have so applied. Instead of attempting in good faith to bring the alleged unreasonableness to Judge Wirtz's attention with appropriate showings of law and fact which might well have resulted in a modification of the

order if it was in fact too restrictive, Petitioners, according to the undenied and uncontradicted record and affidavits alleging violation of the order (R. 93-97), chose to follow the same willful and contumaceous course which was so strongly condemned in *United States v. United Mine Workers* (1947) 330 U.S. 258, 91 L. ed. 884, 67 S. Ct. 677, and thereafter chose to apply to the Territorial supreme court for the writ of prohibition which only questioned the general jurisdiction of Judge Wirtz under the Norris-LaGuardia Act to act in the case, and not the form of the temporary restraining order or its reasonableness.

Finally, we deny that the present proceeding for a writ of prohibition was one against "proceedings for contempt for alleged violation of the order." A reading of the petition for the writ (R. 15-21) will make this clear, for it merely prays for a writ of prohibition against Judge Wirtz prohibiting him from proceeding further in the injunction suit, whereas, the criminal contempt proceedings which are pending are entirely separate proceedings. We will not elaborate further on this point, as the brief of counsel in behalf of the Respondent Cable A. Wirtz fully covers the same.

However, we should like to add just this observation: That even if the contempt proceedings were within the scope of the issues of the present case, under the doctrine of the *United Mine Workers* case, supra, there is no reason to relieve Petitioners from the consequences of their willfully contumaceous acts, for if the question of the application of the Norris-LaGuardia Act to territorial circuit courts was sufficiently doubtful to induce both the Territorial supreme court and the Ninth Circuit Court of Appeals unanimously to sustain Judge Wirtz's jurisdiction to issue the order, it can hardly be said that the jurisdictional question was frivolous and insubstantial, and it was the duty of the respondents therein (Petitioners herein) to obey that order until reversed by the orderly processes of law, if

erroneous. For the purposes of this brief, we refer to and adopt the brief in behalf of the Respondent Cable A. Wirtz on this point.

In closing, we do not consider it necessary to comment upon the desperate resort of Petitioners to government reports, newspaper accounts, and other matters not in the record, to bolster up an obviously weak case. (See Petitioners' Brief, Petition p. 29, Notes 27, 30; p. 30, Note 31; p. 31, Note 32.) Like the Bible, excerpts from government reports (neither in the record nor brought up below in a manner that would enable opposing parties to cross-examine or otherwise bring out other relevant facts or even the inaccuracy or inapplicability of the statements or statistics — witness the recent government estimates of housing needs reported in the press which now appear to have missed four million newly constructed or rehabilitated housing units) properly chosen and edited, can be used to "prove" almost anything. Nor is it necessary to answer the references (Petition p. 29, Notes 28, 29, 30) to the tortured reasoning of *ILWU v. Ackerman* . . . F. Supp. . . . , decided December 27, 1948, which is now on appeal and upon which this Court, if it desires, will have full opportunity to pass directly, and which decision, as pointed out ante, pp. 26-27, is utterly disconnected with and immaterial to the issues of this case.

CONCLUSION

Having, as we believe, demonstrated that no sound and substantial ground has been alleged or shown for granting the Petition for a Writ of Certiorari, it is submitted that the same should be denied.

Respectfully submitted,

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APPENDIX A

ORGANIC ACT

An Act to Provide a Government for the Territory of Hawaii

CHAPTER I. GENERAL PROVISIONS

Sec. 1. Definitions. That the phrase "the laws of Hawaii," as used in this Act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America.

The constitution and statute laws of the Republic of Hawaii then in force, set forth in a compilation made by Sidney M. Ballou under the authority of the legislature, and published in two volumes entitled "Civil Laws" and "Penal Laws," respectively, and in the Session Laws of the Legislature for the session of eight hundred and ninety-eight, are referrd to in this Act as "Civil Laws," "Penal Laws," and "Session Laws." (48 U.S.C. 493.)

Sec. 5. United States Constitution. That the Constitution, and, except as otherwise provided, all the laws of the United States. including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; **Provided,** That sections 1841 to 1891, inclusive, 1910 and 1912, of the Revised Statutes, and the amendments thereto, and an act entitled "An act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes," approved July 30, 1886, and the amendments thereto, shall not apply to Hawaii. (As am. May 27, 1910, 36 Stat. c. 258, s. 1; April 12, 1930, 46 Stat. 160, c. 136; June 6, 1932, 47 Stat. 205, c. 207, s. 116 (b); 48 U.S.C. 495.)

Sec. 6. Laws of Hawaii. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States. (48 U.S.C. 496.)

Sec. 10. Construction of existing statutes. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed; and those in favor of or against the Republic of Hawaii, and not assumed by or transferred to the United States, shall be equally valid in favor of or against the government of the Territory of Hawaii. All offenses which by statute then in force were punishable as offenses against the Republic of Hawaii shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this Act, or shall be repealed or changed by law. No person shall be subject to imprisonment for nonpayment of taxes nor for debt. All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this Act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii: **Provided,** That no suit or proceedings shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or service, nor shall any remedy exist or be enforced for breach of any such contract, except in a civil suit or proceeding instituted solely to recover damages for such breach: **Provided further,** That the provisions

of this section shall not modify or change the laws of the United States applicable to merchant seamen.

That all contracts made since August twelfth, eighteen hundred and ninety-eight, by which persons are held for service for a definite term, are hereby declared null and void and terminated, and no law shall be passed to enforce said contracts in any way; and it shall be the duty of the United States marshal to at once notify such persons so held of the termination of their contracts.

That the Act approved February twenty-sixth, eighteen hundred and eight-five, "To prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," and the Acts amendatory thereof and supplemental thereto, be, and the same are hereby, extended to and made applicable to the Territory of Hawaii. (48 U.S.C. 501-504.)

Sec. 11. Style of Process. That the style of all process in the Territorial courts shall hereafter run in the name of "The Territory of Hawaii," and all prosecutions shall be carried on in the name and by the authority of the Territory of Hawaii. (48 U.S.C. 505.)

CHAPTER II. THE LEGISLATURE

* * *

LEGISLATIVE POWER

Sec. 55. That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. The legislature, at its first regular session after the census enumeration shall be ascertained, and from time to time thereafter, shall reapportion the membership in the senate and house of representatives among the senatorial and representative districts on the basis of the population in each of said districts who are citizens of the Territory;

but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; nor shall it grant private charters, but it may by general act permit persons to associate themselves together as bodies corporate for manufacturing, agricultural, and other industrial pursuits, and for conducting the business of insurance, savings banks, banks of discount and deposit (but not of issue), loan, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association. No divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory unless the applicant therefor shall have resided in the Territory for two years next preceding the application, but this provision shall not affect any action pending when this Act takes effect; nor shall any lottery or sale of lottery tickets be allowed; nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the Territorial legislature shall provide; nor shall any public money be appropriated for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government; nor shall the government of the Territory of Hawaii, or any political or municipal corporation or subdivision of the Territory, make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common defense, except that in addition to any

indebtedness created for such purposes the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharves, roads, harbors, and other public improvements, but the total of such indebtedness incurred in any one year by the Territory or any such subdivision shall not exceed one per centum of the assessed value of the property in the Territory or subdivision, respectively, as shown by the then last assessments for taxation, whether such assessments are made by the Territory or the subdivision or subdivisions, and the total indebtedness of the Territory shall not at any time be extended beyond ten per centum of such assessed value of property in the Territory and the total indebtedness of any such subdivision shall not at any time be extended beyond five per centum of such assessed value of property in the subdivision, but nothing in this Act shall prevent the refunding of any indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof; nor shall any bond or other instrument of any such indebtedness be issued unless made payable in not more than thirty years from the date of the issue thereof; nor shall any issue of bonds or other instruments of any such indebtedness be made after July 1, 1926, other than such bonds or other instruments of indebtedness in serial form maturing in substantially equal annual instalments, the first instalment to mature not later than five years from the date of the issue of such series, and the last instalment not later than thirty years from the date of such issue; nor shall any such bond or indebtedness be issued or incurred until approved by the President of the United States: **Provided,** That the legislature may by general act provide for the condemnation of property for public uses, including the condemnation of rights of way for the transmission of water for irrigation and other purposes. (As am. May 27, 1910, 36 Stat. 443, s. 4; July 9, 1921, 42 Stat. c. 42, s. 302;

June 9, 1926, 44 Stat. 710, c. 512, ss. 1, 2; 48 U.S.C. 519, 562.)

CHAPTER IV. THE JUDICIARY

Sec. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided. (48 U.S.C. 631.)

Sec. 82. Supreme court. That the supreme court shall consist of a chief justice and two associate justices, who shall be citizens of the Territory of Hawaii and shall be appointed by the President of the United States, by and with the advice and consent of the Senate of the United States, and may be removed by the President: **Provided,** however, That in case of the disqualification or absence of any justice thereof, in any cause pending before the court, on the trial and determination of said cause his place shall be filled as provided by law. (48 U.S.C. 632.)

Sec. 83. Laws continued in force. That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed of aliens or foreigners only, or to be constituted by impaneling natives of Hawaii only, in civil and criminal cases specified in said laws, are repealed, and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and twenty-one years of age and who cannot understandingly speak, read, and write

the English language shall be a qualified juror or grand juror in the Territory of Hawaii. No person shall be convicted in any criminal case except by unanimous verdict of the jury. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries, and shall sit at such times as the circuit judges of the respective circuits shall direct; the number of grand jurors in each circuit shall be not less than thirteen, and the method of the presentation of cases to said grand jurors shall be prescribed by the supreme court of the Territory of Hawaii. The several circuit courts may subpoena witnesses to appear before the grand jury in like manner as they subpoena witnesses to appear before their respective courts. (48 U.S.C. 635.)

Sec. 84. Disqualification by relationship, pecuniary interest, or previous judgment. That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the judge or juror has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the legislature of the Territory may add other causes of disqualification to those herein enumerated. (As am. May 27, 1910, 36 Stat. c. 258, s. 6; 48 U.S.C. 636.)

CHAPTER V. UNITED STATES OFFICERS

* * *

Sec. 86. Federal court. (a) That there shall be established in the said Territory a district court, to consist of two judges, who shall reside therein and be called district

judges, and who shall each receive an annual salary of $10,000, to be paid in monthly instalments. The two judges shall from time to time, either by order or rules of the court, prescribe at what times and in what classes of cases each of them shall preside.

The two judges may each hold separately and at the same time a session of the court (whether at the same or different terms of court, regular or special) and may preside alone over such session. The said two judges shall have the same powers in all matters coming before the court; and in case two sessions of the court are held at the same time, the judgments, orders, verdicts, and all proceedings of a session of the court, held by either of the judges, shall be as effective as if one session only were being held at a time.

(b) The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint two district judges, a district attorney, and a marshal of the United States for the said district, all of whom shall be citizens of the Territory of Hawaii and shall have resided therein for at least three years next preceding their appointment. Said judges, attorney, and marshal shall hold office for six years unless sooner removed by the President.

(c) The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States.

(d) Appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and appeals may be taken to the Supreme Court of the United States from said district court in cases where appeals are allowed from the district courts of the United States

to the Supreme Court, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. Regular terms of said court shall be held at Honolulu on the second Monday in April and October, and special terms may be held at such times and places in said district as the said judges may deem expedient. The said district judges shall appoint a clerk and a reporter of said court. The clerk of the district court with the approval of the judges thereof may appoint deputy clerks. (As am. March 3, 1905, 33 Stat. c. 1465, s. 3; March 3, 1909, 35 Stat. c. 269, s. 1; March 3, 1911, 36 Stat. 1167, c. 231, s. 291; March 4, 1921, 41 Stat. 1412, c. 161, s. 1; July 9, 1921, 42 Stat. c. 42, s. 313; June 1, 1922, 42 Stat. 599, 614, 616, c. 204, Title II; January 3, 1923, 42 Stat. 1068, 1084, c. 21; Title II; February 12, 1925, 43 Stat. 890, c. 220; February 13, 1925, 43 Stat. 936, c. 229, s. 13; December 13, 1926, 44 Stat. 919, c. 6, s. 1; January 31, 1928, 45 Stat. 54, c. 14, s. 1; 28 U.S.C. 345; 48 USC 641-645.)

APPENDIX B

References to and Excerpts From Congressional Record Re Local Autonomy for Territorial Courts and Procedure, in Connection with Passage of Hawaiian Organic Act.

MR. CULLOM . . . *We found a supreme court there, not to administer United States statutes, but to administer the laws of the Territory, which is preserved in the bill and which is in harmony, as we thought, with the general principles and interests of the Government of the United States as well as of that Territory.*

The plan of the bill is to retain the legislature, the system of local courts, purely to administer Territorial statutes, and to provide a United States judge to administer the United States laws . . . We believe there is *no occasion for changing everything there simply because we can and because in the Territories here in our own country we have United States judges to administer Territorial statutes as well as United States statutes.* We believe it is wise to *allow the judges of the local courts there to have entire control and jurisdiction over the local statutes of the Territory* and a *United States judge to administer the United States laws.* (Emphasis added.) (33 Cong. Rec. 1871.)

. . . *But the theory of this bill is that they have a supreme court, a circuit court, and other inferior courts,* and there are *appeals from one to another of the territorial courts, and those judges, either of the circuit or supreme court, have nothing to do with decisions on other statutes than those local to the islands. They exist just as in a State.* (Emphasis added.) (33 Cong. Rec. 1929.)

. . . I do not know that it is a matter of very great consequence whether those judges are appointed by the governor or by the President of the United States; but as we are *dealing with a settled community, a state, a government,* full of people, so far as it has gone — not a great number there yet — but there has been a *government established for a great many years;* they *have their system of courts, they have their system of law, they have their construction of statutes by their supreme court and circuit courts, and they are familiar with them, and they felt entirely satisfied with the system they have,* and it seemed to the commission and afterwards to the committee that *the less we interfered with them the better it was for the people there as well as for the United States generally* . . . .

So we found the supreme court there doing business with just as much dignity, with just as much sense of honor and of duty, and apparently with just as much intelligence as the supreme court of the State of Illinois or of Connecticut, or of any other State. There was nothing in the establishment there in any way that the commission could see would justify us in uprooting the supreme court or the circuit courts of the islands and requiring the Government of the United States to meddle with them. So it was the conclusion of the commission and of the committee that as far as that was concerned we ought to leave that alone at present. (Emphasis added.) (33 Cong. Rec. 2025.)

MR. MORGAN . . . there are other circumstances which have been forced upon the attention of Congress hitherto, chiefly by the sparsity of an educated and trained population in the Territories which we have heretofore organized. Heretofore, up to the present time indeed, except, I believe, in the case of Alaska, we have conferred upon what they call the United States courts in the Territories — the same courts the Senator from Connecticut is now trying to put upon the island of Hawaii — we have conferred upon them the power to enforce the laws of the United States, assuming under the decisions of the Supreme Court that Congress as the supreme sovereign over the Territories has the right to combine the powers of the State government and the powers of the Federal Government in the appointment of judicial officers for the Territories. We have conferred upon them *the double duty, and sometimes the irreconcilable duty, of passing upon questions that arise in the Territories themselves, and which concern private interests entirely, combining them with questions that arise under the laws of the United States and are entirely different in their purposes and in the means of execution from the Terri-*

torial or local laws. For instance, we have conferred upon those Territorial courts the power of admiralty in several cases.

Now what greater inconsistency can there be than that of a Territorial court exercising all of the local jurisdiction that belongs to a State court or county court or probate court or criminal court and uniting that with the jurisdiction conferred under the laws of the United States upon the district and circuit courts in admiralty? How are we to expect to find judges of sufficient breadth of learning, sufficient ability to manage these diverse and incongruous conditions? We have escaped heretofore for the reason that it has very seldom happened that our Territorial courts have been called upon to administer admiralty jurisdiction, but I can conceive of nothing more unseemly in legislation to provide judicial jurisdiction and officers than to place in the hands, for instance, of a circuit judge of the State of Alabama the power to determine and execute the laws of the United States in Alabama. If he can not do it properly in Alabama, if there are public reasons connected with the harmony of the judicial establishment why a circuit judge in Alabama can not exercise such power, how can we justify conferring double jurisdiction upon a Territorial court?

The Territorial court, under the decisions of the Supreme Court, derives from Congress, in view of its competent powers, *all of the rights of a circuit court of Alabama or any other State,* and also all of the rights, powers, and jurisdiction that belong to Federal courts. Those courts in practice have two dockets, one of which is for the disposal of cases that are local in their origin and in their effect — purely local litigation. The other docket relates to cases of the Government of United States or cases in which the Government of the United States is involved. *This committee, and the commis-*

sion, also, having some idea about this matter, undertook to get rid of this incongruity, this unnecessary mixing of two jurisdictions in the mind of a man serving two masters upon the bench, and we first of all separated the local courts in Hawaii entirely from the courts of the United States, and gave to them that kind of local jurisdiction that a circuit or other court in a State possesses.

Then in order that the Government of the United States might have its rightful powers exercised judicially in the Hawaiian Islands, the committee recommended that *a district court of the United States* should be established in those islands having a jurisdiction that is unequivocal, that is plenary, that has been defined by statute and by judicial decisions so that there is no doubt or dispute about its powers at all, and *that in that jurisdiction that judge, representing the Government of the United States, should preside in all cases where the laws and rights of the Government of the United States were involved.*

Now, is there any serious objection, is there any constitutional objection, can there by any objection in theory or in practice to establishing in the islands of Hawaii *the two separate jurisdictions just as they exist in the States?* . . . (Emphasis added.) (33 Cong. Rec. 2123-4.)

Similar sentiments are expressed in 33 Cong. Rec., by other Senators: Stewart (p. 1932-3), Foraker (1933-4, 2133), Cullom again (2189), Morgan again (2191-4, 2398-2400), Teller (2388-9, 2441), Nelson (2397).

In the debates in the House, on the same bill, the same views were expressed, Rep. Knox and Rep. Hamilton taking the leading part: See 33 Cong. Rec. 3771, 3801, 3859, and conference reports, pp. 4358, 4649, and 4733.

FILE COPY

No. 510

IN THE

Supreme Court of the United States

October Term 1948

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), *et al.*,
Petitioners,

vs.

CABLE A. WIRTZ, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

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TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, the International Longshoremen's and Warehousemen's Union (CIO), an affiliated local and unit, trade union in the Territory of Hawaii, and individual members and officers of these unions, respectfully request a rehearing of the order of this Court denying the issuance of a writ of certiorari to the Court of Appeals for the Ninth Circuit.

The order denying the writ was entered February 28, 1949. On application, petitioners' time within which to file a petition for rehearing was extended to April 15, 1949, by order of the Honorable Hugo L. Black, Associate Justice.

SUMMARY STATEMENT OF FACTS

Petitioners applied to the Supreme Court of the Territory of Hawaii for a perpetual writ of prohibition against the respondent judge and sugar company enjoining them from proceeding in an equity action in the territorial circuit court. At the time of the filing of the petition for the writ, the only proceedings pending were charges against the individual petitioners for contempt of an *ex parte* restraining order issued by the respondent judge at the request of the respondent sugar company, prohibiting peaceful picketing and assembly by petitioners. The rest of the issues in the equity action had been mooted at the time of the filing of the petition for the writ by the end of the strike.

The *ex parte* order for contempt of which petitioners were charged prohibited petitioners from

> (f) Mass picketing or other congregating in crowds on or near the premises of the Petitioner;
> And in Furtherance Hereof, You are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets stationed at points of ingress and egress to the Petitioner's property, exclusive of the homes occupied by Petitioner's employees, said pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and without interfering with the Petitioner, its employees, or any other persons seeking to enter or leave the Petitioner's premises; said pickets being also enjoined from otherwise committing any of the acts hereinabove specified. . . .

QUESTION PRESENTED

Are the procedural provisions of the Norris-LaGuardia Act applicable to territorial circuit courts and the substantive rights created effective in Hawaii, and was the respondent judge without jurisdiction to issue the *ex parte* order complained of either because of the Norris-LaGuardia Act, or because the order he issued violated petitioners' rights guaranteed by the First Amendment?

GROUNDS OF PETITION FOR REHEARING

Petitioners request rehearing on the basis of a decision of this Court decided since the denial of the writ, and a decision of the court below in a case involving similar issues made since the filing of the petition herein, and upon substantial grounds not presented in the original petition. These grounds are:

I.

Since the denial of the writ, this Court on March 14, 1949 decided the case of *Stainback v. Po*.[1] Petitioners believe that the issues here involved should be reconsidered in the light of the re-evaluation of the relation of courts of the Territory to the federal judicial system and the re-appraisal of the difference in status of the Territory of Hawaii in contrast with a sovereign state contained in that opinion.

This Court said at page 7 of its opinion:

> Hawaii is still a territory but a territory in which the Constitution and laws of the United States generally are applicable. . . . Not only its federal courts but also its territorial courts are of course subject to congressional legislation. . . .

[1] Nos. 52 and 474, October Term, 1948.

And again at page 9, this Court said:

> In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory. A territory is subject to congressional regulation.

The reasons this Court found persuasive of the *exclusion* of the territorial federal court from the provisions of Section 266 of the Judicial Code offer sound basis for finding the *inclusion* of territorial courts within the scope of the Norris-LaGuardia Act.

Congress in Section 5 of the Hawaiian Organic Act (48 U.S.C. 495) provided:

> That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

There is nothing in the legislative history of the Norris-LaGuardia Act to indicate an intention to exclude the federally-created courts of Hawaii. The legislative definition of courts contained in the act encompasses the broadest scope within the power of Congress — "courts of the United States whose jurisdiction has been or may be conferred, or defined, or limited by Act of Congress." But even more important, Congress established a public policy of the United States in strong unequivocal language and directed that the act be construed to carry out that policy to protect the rights of labor.[2]

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[2] The Senate Judiciary Committee reporting the bill declared: The primary objective of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights —to protect first, the right of free association and, second, the right to advance the lawful objectives of association.

In the absence of any provision exempting federally-created territorial courts from legislation designed to remedy evils which Congress found "intolerable" and "violation of sacred rights of human liberty and freedom" the exemption found by the court below seems erroneous.

That Congress did not regard the provisions of the bill as inappropriate in the field of local law is apparent by its application of the act to all courts in the District of Columbia which has a considerably larger population and labor force than the Territory of Hawaii.

It is respectfully submitted that if the question presented is examined in the light of the *Po* case, the conclusion that the Norris-LaGuardia Act applies to territorial courts is inevitable.

II

The respondent judge was without jurisdiction to issue the *ex parte* order complained of because on its face it violates petitioners' rights of free speech and assembly guaran-

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And again in respect to the public policy:

> It is believed that the public policy of the United States thus declared is free from any possible objection if we desire to give those who labor equal opportunities in the economic world with the employers of labor.

And in respect to the legislative definitions on which the Court of Appeals wholly rested its decision:

> Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions. The main purpose of these definitions is to provide for limiting the injunctive powers of federal courts only in the special type of cases commonly called labor disputes, in which these powers have notoriously extended beyond the mere exercise of civil authority and wherein courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.
>
> (72nd Congress, 1st Session, Senate Report No. 163, To Accompany S. 935.)

teed by the First Amendment, and petitioners are entitled to a perpetual writ of prohibition against its enforcement. Thus petitioners contend they are entitled to relief even if it is held that the substantive and procedural provisions of the Norris-LaGuardia Act do not affect the jurisdiction of territorial circuit courts or affect the power of judges of such courts to issue injunctions in cases arising out of labor disputes.

Petitioners argued this contention before the Supreme Court of the Territory and the Court of Appeals, but neither court considered this contention.[3]

Petitioners contend that a circuit court judge does not have jurisdiction, in an *ex parte* hearing, to prohibit the exercise of petitioners' right of peaceful picketing and assembly guaranteed by the First Amendment. Petitioners believe that the *ex parte* order of the respondent judge on its face abridges these rights of petitioners as interpreted by this court in *Thornhill v. Alabama*, 310 U.S. 88, *Carlson v. People of California*, 310 U.S. 106, *American Federation of Labor v. Swing*, 312 U.S. 321, *Thomas v. Collins*, 323 U.S. 516, *Marsh v. Alabama*, 326 U.S. 501.[4]

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[3] Respondents deny that the issue of constitutional rights is raised by the Petition for the Writ of Prohibition, and apparently both courts below agreed with their contention. Petitioners contend that their petition raised the question of lack of jurisdiction of the respondent judge, and that if he was without jurisdiction to issue the order either by virtue of the Norris-LaGuardia Act, or because his order infringed on rights guaranteed by the First Amendment, they are entitled to relief.

[4] The ex parte order proscribing peaceful picketing and assembly was issued on October 17, 1946. The alleged contempt occurred on October 18, 1946, as the result of a parade through the streets of the company town. Even under the doctrine of *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, an *ex parte* hearing is surely an "insubstantial finding screening reality." And surely the mere invocation of the words "picketing en masse" used in the *Thornhill* case, do not justify any *ex parte* restraint that a territorial judge sees fit to impose.

Congress itself could not by law adopt a restraint of free speech and assembly as sweeping as the *ex parte* order of the respondent judge. Power delegated to territorial courts by Congress can only be exercised in a manner consistent with federal law and the Constitution.

Petitioners respectfully submit that the courts below erroneously denied them a perpetual writ of prohibition against the enforcement by summary contempt of the *ex parte* order complained of since on its face it collides with rights guaranteed by the First Amendment.

III

After the filing of the petition for certiorari herein on January 24, 1949, the Court of Appeals for the Ninth Circuit in *Alesna v. Rice* (No. 11, 872 on the docket of that court, Petition for Certiorari pending in this Court) sustained a decree of the Federal District Court dismissing a complaint for injunction filed under the civil rights act alleging on four different grounds a deprivation of federal and constitutional rights. Factually the background of this case and the *Alesna* case are almost identical. In both proceedings for contempt of an *ex parte* restraining order prohibiting peaceful picketing and assembly at the scene of a labor dispute are involved. In both cases, the issue of lack of jurisdiction of territorial circuit courts to issue *ex parte* orders under the Norris-LaGuardia Act are presented.

One of the grounds on which the Court of Appeals relied in sustaining the dismissal of the complaint in the *Alesna* case was that the petitioners there could have filed a writ of prohibition proceeding in the Supreme Court of the Territory, as in the instant case, and hence were not entitled to seek equitable aid from the Federal District Court. The Court of Appeals said:

> In addition, under the Hawaiian law exists the remedy of prohibition by the Hawaiian Supreme Court, a

> remedy parallel to injunction, against the territorial court in which the same issues may be disposed of summarily with the right of appeal here. Cf. *International Longshoremen's Union v. Wirtz*, 170 F. (2d) 183, 184 (Cir. 9), where the question was whether the Hawaiian court had its jurisdiction to issue injunctions in labor disputes limited by the Norris-LaGuardia Act. As well could be raised in a prohibition proceeding in the Hawaiian Supreme Court the contention of the absence of jurisdiction because the prosecution was for action permitted by the first amendment and a statute making it criminal is void.

As pointed out under Point II of this petition, petitioners argued both before the Supreme Court of the Territory and before the Court of Appeals that the writ of prohibition should issue—even if the courts found the Norris-LaGuardia Act inapplicable to territorial courts— because the *ex parte* order violated petitioners' rights under the First Amendment, but neither court considered this point, apparently on the ground that the issue was not raised by the petition.

But petitioners here and in the *Alesna* case, are thus placed on a procedural merry-go-round.

Together these two cases present clearly the picture of the violation by territorial circuit court judges of federal and constitutional rights of Hawaiian workers by the issuance of sweeping *ex parte* injunctions directed in effect against the general public proscribing peaceful picketing and assembly and so narrowly circumscribing those rights as to rob them of all substance. These two cases, examined together, show the necessity of this Court exercising its

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[5] See *Goto v. Lane*, 265 U.S. 393 (27 Haw. 65). This was an appeal from a denial of a writ of habeas corpus by the United States District Court for Hawaii after conviction of fifteen leaders of the Hawaiian Higher Wage Consummation Association for conspiracy after the 1920 sugar strike. This court did not consider the merits but held that the attorney for the workers had waived defects in the indictment and since he had permitted the time for writ of error to expire, petitioners were not entitled to habeas corpus as a substitute.

supervisory jurisdiction. In the almost fifty years this Court has been the Court of last resort for the Territory of Hawaii no case defining and establishing the federal and constitutional rights of Hawaii's working men have come before this court.[5]

The Supreme Court of Hawaii, the District Court of the United States for Hawaii and the Court of Appeals have in effect in this case and the *Alesna* case sanctioned the practice of territorial circuit courts on *ex parte* assertions of employers in acting as "policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers,"[6] and have in effect given territorial judges a license *in futuro* to continue to issue blanket *ex parte* injunctions.

Petitioners respectfully request this Court to grant rehearing of its denial of a petition for certiorari herein and to consolidate this case for hearing with the *Alesna* case, now pending on petition for certiorari before this court, because of the great importance to the working men of Hawaii of the issues presented by these cases.

Respectfully submitted,

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
By HERBERT RESNER,
Attorneys for Petitioners

BOUSLOG & SYMONDS
By HARRIET BOUSLOG
Of Counsel

Dated: April 9, 1949.

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[6] 72nd Congress, 1st Session, Report No. 163, Report to Accompany S. 935.

CERTIFICATE OF COUNSEL

I hereby certify that the Petition for rehearing in the above entitled matter is presented in good faith and not for delay and that it is restricted to intervening circumstances of substantial effect and to substantial grounds which petitioner did not previously present.

HERBERT RESNER

April 9, 1949.